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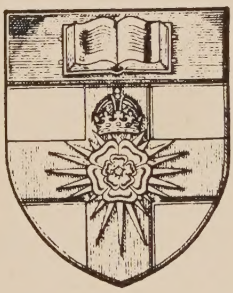

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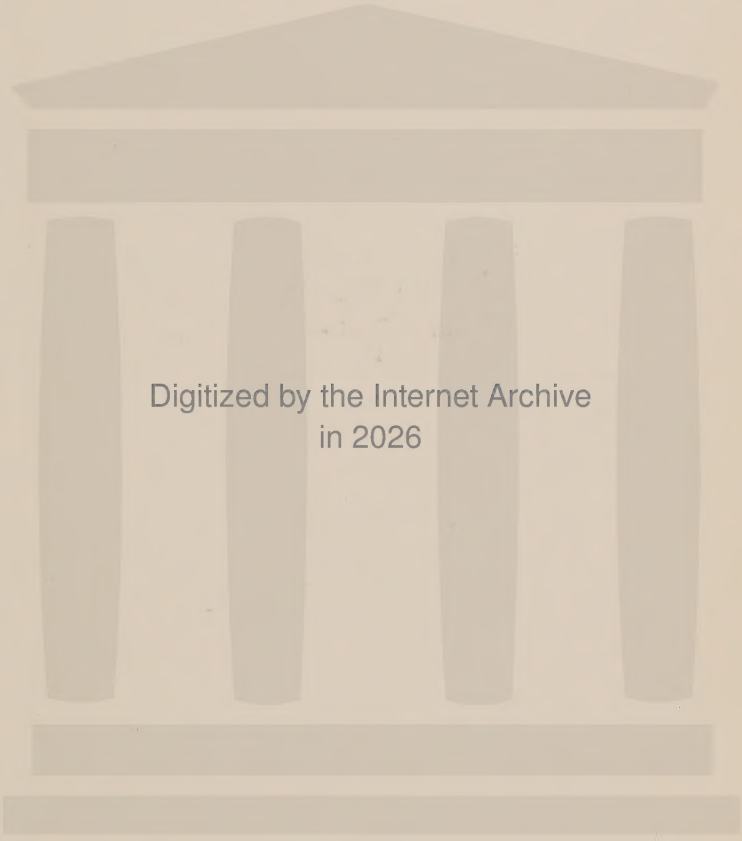
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1912.—VOL. II.

LONDON:

Printed for the Council of Law Reporting

BY BRADBURY, AGNEW, & CO. LD., OF 10, BOUVERIE STREET, E.C.,

And Published

BY THE COUNCIL AT 10, OLD SQUARE, LINCOLN'S INN, W.C.

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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

[RAILWAY AND CANAL COMMISSION.]

1911
July 28.

PORT OF LONDON AUTHORITY *v.* MIDLAND RAILWAY COMPANY AND OTHERS.

Railway —Railway and Canal Commission—Practice—Application for Through Rate over one Railway—Intervention of competing Railways—Railway and Canal Traffic Act, 1888 (51 *&* 52 *Vict. c.* 25), *s.* 7.

Sect. 7 of the Railway and Canal Traffic Act, 1888, which authorizes certain local authorities and associations of traders and others to appear in opposition to any complaint which the Commissioners have jurisdiction to determine, is not exhaustive of the classes of persons whose intervention in such a complaint the Commissioners have jurisdiction to allow.

An agreement was entered into between the several railway companies which conveyed traffic to and from the various docks in the Port of London whereby they grouped the said docks together and charged the same rate from given points on their systems for similar traffic to every dock. Subsequently the Port of London Authority, in whom the said docks were then vested, made application to the Railway and Canal Commission for a new and reduced through rate from two

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of the said docks to various stations on the systems of certain of the contracting railway companies. Certain of the other contracting railway companies claimed to intervene :—

Held, that there was jurisdiction to allow the intervention.

APPLICATION by the Port of London Authority to the Railway and Canal Commission for an order allowing certain through rates.

By the Port of London Act, 1908, the undertaking of the London and India Docks Company became vested in the applicants. That undertaking included the Victoria Dock and the Albert Dock and the railway lines, sidings, and wharves forming part of the said docks. Previously to the passing of the said Act the predecessors of the applicants had proposed alterations of the then existing through rates for the carriage of traffic to and from some of the London docks over the railways of certain railway companies, but it was held by the Railway and Canal Commission that as the dock companies were not statutory railway companies there was no jurisdiction to grant the through rates proposed by them. By s. 31 of the said Act it was provided that "Any lines and sidings forming part of any dock undertaking belonging to the Port Authority shall be deemed to be railways, and the Port Authority shall be deemed to be a railway company for the purpose of such of the provisions of the Railway and Canal Traffic Acts 1854 to 1888 as relate to through rates. Provided that the Railway and Canal Commission shall not fix such a through rate in any case in which it appears to them that it would be unjust or inexpedient to do so."

The application was for an order allowing a certain reduction in the existing through rates for traffic to be forwarded by the Midland Railway Company between the Victoria and Albert Docks and certain places specified in the schedule to the application upon the railways of the Midland Railway Company, the Great Eastern Railway Company, and the Tottenham and Hampstead Joint Committee.

For many years the London and North Western Railway Company, the Great Northern Railway Company, and the other railway companies conveying traffic to and from the Port of London had in pursuance of an agreement made between the

said railway companies in that behalf grouped together the whole of the docks now vested in the applicants and treated them as one dock for the purposes of railway rates, charging from any given point the same rate for similar traffic to every dock. The London and North Western Railway Company and the Great Northern Railway Company objected to the through rates proposed by the applicants and claimed to intervene on the hearing of the application.

Sir Alfred Cripps, K.C., and *Lynden Macassey*, for the London and North Western Railway Company. The Commissioners have jurisdiction to allow the intervention. It is true that s. 7 of the Railway and Canal Traffic Act, 1888 (1), allows of intervention by certain classes of persons therein specified which do not include the present interveners. But that section was not intended to be exclusive. It provided that the classes of persons there specified might make complaint to the Commissioners although there was no proof that they were "aggrieved by the matter complained of." It was enough that they were "likely to be affected by any determination of the Commissioners upon such complaint." Every Court has, without any statute directly conferring such power, inherent jurisdiction to allow any persons to appear who are aggrieved by the litigation; and in the

(1) By the Railway and Canal Traffic Act, 1888, s. 7, sub-s. 1 (as amended by 8 Edw. 7, c. 49), "Any of the following authorities that is to say—(*a*) Any of the following local authorities, namely, any harbour board, or conservancy authority, the Common Council of the city of London, any council of a city or borough, any representative county body or any urban sanitary authority not being a council as aforesaid, or any rural sanitary authority; or (*b*) any such association of traders or freighters, or chamber of commerce or agriculture as may obtain a certificate from the Board of Trade that it is in the opinion of the Board of Trade a proper body to make such complaint, may make to the Commissioners any complaint which the Commissioners have jurisdiction to determine, and may do so without proof that such authority is aggrieved by the matter complained of, and any of such authorities may appear in opposition to any complaint which the Commissioners have jurisdiction to determine in any case where such authority or the persons represented by them appear to the Commissioners to be likely to be affected by any determination of the Commissioners upon such complaint.

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exercise of that power the Commissioners are entitled to hear the present interveners upon the subject of the application. Then if the Commissioners have power to allow the intervention they ought in the exercise of their discretion to allow it, for unless they have the necessary parties before them it will be impossible to determine whether the proposed through rates will be just or expedient within the meaning of s. 31 of the Port of London Act.

Balfour Browne, K.C., *Sir Alfred Cripps, K.C.*, and *Lynden Macassey*, for the Great Northern Railway Company.

Bailhache, K.C., *Whitehead, K.C.*, and *Raymond Asquith* (*J. D. Fitzgerald, K.C.*, with them), for the Port of London Authority. The Commissioners have no jurisdiction to hear the interveners. There is no power to allow intervention except to the classes of persons coming within s. 7 of the Railway and Canal Traffic Act, 1888. The mere fact that a railway company would be affected by the subject-matter of the application does not entitle them to intervene. Intervention of this kind is a thing of which the Courts of law know nothing. In those Courts a third person is not entitled to intervene in an action merely because he has a contract with the defendant and his contractual rights might be prejudiced by the result of the litigation. The only ground on which a third person is allowed to intervene in any action is that the judgment will affect his property. That it will affect his contractual rights is not enough.

Sir Alfred Cripps, K.C., in reply.

A. T. LAWRENCE J. We think that upon the whole we ought to allow the intervention in this case. Mr. Bailhache has taken a point that there is no jurisdiction to do so. The answer to that, I think, is that we have the same jurisdiction as the Common Law Courts have in the matter of intervention. In this particular case the subject-matter is the proposed alteration of certain group rates. The companies applying to intervene are parties to an agreement whereby all the railway companies conveying traffic to and from these docks agreed inter se to serve all the docks at group rates. This then being an application for an order dealing with those group rates, it is an application to deal with a contract to which

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the intervening railway companies are parties. I think that at common law there would be a right to intervene in such a case, and that consequently we have jurisdiction to allow it here. [He then proceeded to deal with the question whether upon the merits it was desirable to allow the intervention and came to the conclusion that it was.]

HON. A. E. GATHORNE-HARDY and SIR JAMES WOODHOUSE concurred.

Judgment for the interveners.

Solicitor for the London and North Western Railway Company: *C. de J. Andrewes.*

Solicitor for the Great Northern Railway Company: *R. Hill Dawe.*

Solicitors for the Port of London Authority: *E. F. Turner & Sons.*

J. F. C.

HALL *v.* HAYMAN.

1911

Dec. 12, 13, 14, 19.

Insurance (Marine)—Constructive Total Loss—Policy on Ship—Cost of Repair—Value of Wreck—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *s.* 60.

The law as laid down by the House of Lords in *Macbeth & Co.* v. *Maritime Insurance Co.* [1908] A. C. 144, is altered by s. 60, sub-s. 2 (ii.), of the Marine Insurance Act, 1906. In determining whether a ship, which is seriously damaged by perils insured against, can be treated as a constructive total loss within the meaning of that enactment, the assured is not entitled to add the value of the wreck to the cost of repairs.

TRIAL of action in the commercial list before Bray J. without a jury.

The plaintiff claimed on behalf of himself and all others the assured for a total loss upon a policy of re-insurance, dated July 31, 1908, and underwritten by the defendant and others, upon the steamship *King Edward.*

By a policy of marine insurance dated June 30, 1908, James Holliday, the owner of the *King Edward*, insured her for twelve months from May 23, 1908, against all the usual perils; warranted

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laid up from November 30 to opening of St. Lawrence navigation. The policy was for 5100*l.* upon the steamship valued at $34,000, and was underwritten by the plaintiffs for 1313*l.*

The plaintiffs in respect of their liability under the above policy caused themselves to be re-insured by a policy dated July 31, 1908 (which was the policy sued upon), for 1044*l.* upon the *King Edward* for the twelve months; warranted laid up November 30 to opening of St. Lawrence navigation as original. The policy was expressed to be on the steamship "valued at $34,000 or as original, being against the risk of total or constructive total loss only." There was a clause in the policy, called "Re-insurance Clause," as follows: "Being a re-insurance of original policy or policies of Lloyds underwriters, whether re-insurance or otherwise, and to pay as may be paid thereon, but subject to the terms of this insurance." Attached to the policy was a clause (which was not in the original policy) that "the insured value shall be taken as the repaired value in ascertaining whether the vessel is a constructive total loss."

On November 16, 1908, the *King Edward* was driven ashore in a gale at English Bay, Anticosti, about 500 miles from Quebec, and sustained serious damage to her hull, engines, and boilers. The navigation season was just about to close owing to the ice, and an attempt to get her off failed, and she remained there embedded in the ice during the winter.

Notice of abandonment was given by Holliday to the plaintiffs, who paid upon the original policy as upon a constructive total loss, and on March 25, 1909, the plaintiffs brought the present action against the defendants, claiming as for a constructive total loss under the re-insurance policy. When the ice opened in the spring of 1909 an unsuccessful attempt was made to float the ship, but upon a second attempt she was floated by salvors employed on behalf of the plaintiffs and was towed to Quebec in July of that year, where she was sold before being repaired for $14,000.

The plaintiffs in their points of claim alleged that the *King Edward* was a constructive total loss "by reason of the fact that the cost of repairing her plus the cost of the said salvage and other expenses plus the value of the unrepaired wreck would

exceed the repaired value or alternatively the insured value of $34,000." The defendants in their points of defence, so far as material, denied that the *King Edward* was a constructive total loss, and said that they would contend that her unrepaired value should not be added to the cost of repairs.

The only point upon which the case is reported and to which the arguments were confined is that raised as above stated in the points of claim and defence, namely, whether the value of the wreck should be added to the cost of repairs in determining whether the ship could be treated as a constructive total loss within s. 60 of the Marine Insurance Act, 1906. (1) The learned judge found that the cost of repairs would have amounted to $30,500, which was less than the insured value $34,000, that is the repaired value.

Bailhache, K.C., and *F. D. Mackinnon*, for the plaintiffs. In determining whether there has been a constructive total loss of a ship within the meaning of s. 60, sub-s. 2 (ii.), of the Marine Insurance Act, 1906, the value of the wreck must be added to the cost of repairs. In 1903 the Court of Appeal decided in

(1) 6 Edw. 7, c. 41, s. 60: "Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.

"(2.) In particular, there is a constructive total loss,

"(i.) Where the assured is deprived of the possession of his ship or goods by a peril insured against, and (*a*) it is unlikely that he can recover the ship or goods, as the case may be, or (*b*) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered; or

"(ii.) In the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired.

"In estimating the cost of repairs no deduction is to be made in respect of general average contributions to those repairs payable by other interests, but account is to be taken of the expense of future salvage operations and of any future general average contributions to which the ship would be liable if repaired."

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Angel v. *Merchants' Marine Insurance Co.* (1) that the value of the wreck ought not to be added to the cost of repairs. Before that decision the weight of judicial authority had been in favour of the view that the value of the wreck ought to be added. The Exchequer Chamber in *Young* v. *Turing* (2) had said that the value of the wreck ought to be added to the cost of repairs, and that statement by the Court was not a mere dictum. That view was followed by Barnes J. in *Marten* v. *Sydney Lloyds* (3), by Phillimore J. in *Beaver Line* v. *London and Provincial Marine and General Insurance Co.* (4), and by Walton J. in *Wild Rose Steamship Co.* v. *Jupe.* (5) In *Macbeth & Co.* v. *Maritime Insurance Co.* (6)—a case which arose before the passing of the Marine Insurance Act, 1906, but which was finally decided afterwards—the House of Lords overruled *Angel* v. *Merchants' Marine Insurance Co.* (1), holding that the Court of Appeal ought not to have departed from the authority of *Young* v. *Turing.* (2) Therefore it must be taken that at common law the value of the wreck ought to be added to the cost of repairs in determining whether a ship is a constructive total loss. The law upon this question has now been codified in s. 60 of the Marine Insurance Act, 1906. That section does not say that the value of the wreck is not to be taken into account; it is silent upon the point. Sub-s. 2 (ii.) provides that there is a constructive total loss where the ship is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired; and the sub-section specifies two matters which are to be taken into account, namely, the expense of future salvage operations and any future general average contributions to which the ship would be liable if repaired. Those, however, are not exhaustive, and by s. 91, sub-s. 2, "the rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance." There is nothing in s. 60 inconsistent with the application to contracts of marine insurance of the rule of the common law as laid

(1) [1903] 1 K. B. 811.
(2) (1841) 2 Man. & G. 593.
(3) *The Times*, Dec. 19, 1896.
(4) (1899) 5 Com. Cas. 269.
(5) (1903) 19 Times L. R. 289.
(6) [1908] A. C. 144.

down in *Macbeth & Co.* v. *Maritime Insurance Co.* (1) In truth, as Lord Collins pointed out in that case (2), the wreck "is a necessary factor in the formation of the repaired ship which it is proposed to bring into being"; the wreck is "contributed" at the cost of the owner "to the new entity which is to be formed by the process of reparation." The wreck, therefore, is the foundation upon which the new ship is built, and the cost of the materials is part of the cost of the completed structure, and may be regarded as part of the "expenditure" within s. 60, sub-s. 1, or as part of "the cost of repairing the damage" within s. 60, sub-s. 2 (ii.). But whether that is so or not, the prudent uninsured owner would take the value of the wreck into account, and that rule of the common law is imported into contracts of marine insurance by s. 91, sub-s. 2, of the Act.

Maurice Hill, K.C., and *D. C. Leck*, for the defendants. The value of the wreck ought not to be taken into account in determining whether the ship was a constructive total loss. Before the passing of the Marine Insurance Act, 1906, there were two possible tests as to whether a ship was a constructive total loss. The one was whether the cost of repairs would exceed her value when repaired; the other was whether a prudent uninsured owner would repair her having regard to all the circumstances. Those two tests were clearly stated as being distinct tests by Lord Loreburn L.C. in *Macbeth & Co.* v. *Maritime Insurance Co.* (1), who said that if the matter were an open one he would have preferred the former. When the Act of 1906 was passed there was the decision of the Court of Appeal in *Angel* v. *Merchants' Marine Insurance Co.* (3) that the proper test was whether the cost of repairs would exceed the ship's value when repaired, and that upon that view the value of the wreck ought not to be brought into the calculation. That was supposed to be the common law when the Legislature had to deal with the matter, and they treated it as concluded by the decision in *Angel* v. *Merchants' Marine Insurance Co.* (3) The Legislature in s. 60, sub-s. 2 (ii.), of the Marine Insurance Act, 1906, selected the test as to whether the cost of repairs exceeded the value of the

(1) [1908] A. C. 144. (2) Ibid. at p. 157.
(3) [1903] 1 K. B. 811.

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ship when repaired and rejected the test of the prudent uninsured owner, and it necessarily follows that the value of the wreck is not to be taken into account. Sect. 60, sub-s. 1, lays down the general rule, and in that sub-section the word "expenditure" clearly points to an expenditure of money. Expenditure is a well-known insurance term, and is distinguished from a sacrifice, as in s. 66. The word "expenditure" in that sub-section indicates how the words "the cost of repairing the damage" in the next sub-section ought to be interpreted. Sub-s. 2 (i.), (ii.), deals particularly with a constructive total loss of a ship, of which clause (ii.) is the material one here. There is a constructive total loss of a ship where the cost of repairing the damage would exceed her value when repaired. The clause then states what may be included in the cost of repairing the damage. The value of the wreck is not there specified and so cannot be taken into account. If the Legislature had intended that the value of the wreck should be brought into the account it would have expressly mentioned it. The words "the cost of repairing the damage" do not, in their natural sense, include it. As to the observations of Lord Collins in *Macbeth & Co.* v. *Maritime Insurance Co.* (1), upon which the plaintiffs rely, those observations were made in a judgment a great part of the reasoning in which was intended to shew that the test of the prudent uninsured owner and the test of the cost of repairs were in reality the same. Lord Loreburn L.C. certainly did not agree with that, though he agreed with the conclusion at which Lord Collins arrived upon the authorities. Sect. 60 of the Act is clear and unambiguous, and therefore there is no room for the application of the common law rule as laid down in *Macbeth & Co.* v. *Maritime Insurance Co.* (2) As Lord Herschell said in *Bank of England* v. *Vagliano* (3), in dealing with the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), which codified the law, and which contains in s. 97, sub-s. 2, a provision in similar terms to that contained in s. 91, sub-s. 2, of the Marine Insurance Act, 1906, the proper mode of construing

(1) [1908] A. C. at pp. 152, 157. (2) [1908] A. C. 144.
(3) [1891] A. C. 107, at pp. 144, 145.

a code is "in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view." And later on he said that he was far from saying that resort might never be had to the previous state of the law for the purpose of aiding in the construction of the code; if, for example, a provision were of doubtful import, such resort would be perfectly legitimate. There is no ambiguity about the language of s. 60 of the Marine Insurance Act, 1906, and therefore s. 91, sub-s. 2, cannot be called in aid to import into s. 60 the rule of the common law as laid down in *Macbeth & Co.* v. *Maritime Insurance Co.* (1) The value of the wreck ought therefore not to be taken into account.

Bailhache, K.C., replied.

Cur. adv. vult.

Dec. 19. BRAY J. The plaintiffs' claim is under a policy of re-insurance on the steamship *King Edward* for twelve months. This policy was against total or constructive total loss only, and it contained a clause that the insured value, namely $34,000, should be taken as the repaired value in ascertaining whether the vessel was a constructive total loss, whereas the original policy contained no such clause. The plaintiffs paid upon the original policy as upon a constructive total loss, and they now seek to recover against the defendants upon the re-insurance policy. The plaintiffs have to prove, first, that they were liable to pay upon the original policy; and secondly, that there was a constructive total loss under the re-insurance policy. [His Lordship said that undoubtedly there was a constructive total loss of the vessel within the original policy, and he came to the conclusion that notice of abandonment had been duly given to the plaintiffs as required by s. 62 of the Marine Insurance Act, 1906. With regard to the question whether there

(1) [1908] A. C. 144.

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was a constructive total loss of the vessel within the re-insurance policy, he came to the conclusion upon the facts that there was not a constructive total loss within s. 60, sub-s. 2 (i.), of the Marine Insurance Act, 1906, inasmuch as, though the shipowner was deprived of the possession of his ship, the plaintiffs had not proved that he was unlikely to recover his ship, nor would the cost of recovering the ship exceed her value when recovered.]

There remains the question whether there was a constructive total loss under s. 60, sub-s. 2 (ii.), which provides that there is a constructive total loss "in the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired." [His Lordship went through the various items of the cost of repairs and came to the conclusion that $30,565 was the proper sum to allow.] That falls short of $34,000, the insured value of the ship. It is said, however, that I ought to add to that amount the value of the wreck on the day when the notice of abandonment was given. That depends upon the true construction of s. 60 of the Marine Insurance Act, 1906, and the application to it of s. 91, sub-s. 2. The latter section provides that "the rules of the common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance." In *Bank of England* v. *Vagliano* (1) Lord Herschell, in dealing with a code containing a similar provision,—the Bills of Exchange Act, 1882—said that "the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view"; and that an appeal to earlier decisions could only be justified on some special ground, as, for instance, if the provision were of doubtful import. I must therefore first examine the language of the enactment. Sect. 60, sub-s. 1, contains the general provision that "subject to any

(1) [1891] A. C. 107, at pp. 144, 145.

express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred." It seems to me that the word "expenditure" as there used is a word having a plain meaning, denoting an expenditure of money, and I cannot construe it as including the value of the wreck. The supposed expenditure is by the owner of the ship, and the value of the wreck is not an expenditure by the owner. Then sub-s. 2 (ii.), dealing more particularly with damage to a ship, provides that in particular there is a constructive total loss "in the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired." I do not see any ambiguity in the language there used, "the cost of repairing the damage." The clause proceeds to specify what may and what may not be brought into the calculation: "In estimating the cost of repairs no deduction is to be made in respect of general average contributions to those repairs payable by other interests, but account is to be taken of the expense of future salvage operations, and of any future general average contributions to which the ship would be liable if repaired." It seems to me that sub-s. 2 (ii.) is clear, and is inconsistent with what is now admitted to have been the common law or the law merchant before the Act as laid down by the House of Lords in *Macbeth & Co.* v. *Maritime Insurance Co.* (1) It is said, however, that in construing the words "expenditure" and "the cost of repairing the damage" I ought to have regard to what Lord Collins said in that case (2), that "she"—the wreck—"is a necessary factor in the formation of the repaired ship which it is proposed to bring into being; at whose cost, it may be asked, except that of her owner, is she contributed to the new entity which is to be formed by the process of reparation?" Lord Collins, however, was not construing the Marine Insurance Act, 1906; he was endeavouring to reconcile certain decisions and certain language

(1) [1908] A. C. 144. (2) Ibid. at p. 157.

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used by judges in former cases, and to shew that those decisions and that language were consistent with the decision he was giving. One does not look at the language of a judge in quite the same way as one looks at the words of an Act of Parliament. None of the other Law Lords seem to have taken the same view as Lord Collins; indeed the Lord Chancellor took the view that there were two lines of decisions, and he adopted one rather than the other. The rule therefore of the common law, that the value of the wreck ought to be added to the estimated cost of repairs in determining whether the ship can be treated as a constructive total loss, is, in my opinion, inconsistent with the express provisions of s. 60 and can no longer be treated as the law. It is a consequence which sometimes happens as the result of codifying the law—a somewhat difficult process. It seems to me to be unfortunate because I do not suppose that the Legislature intended to alter the common law. At the time of the passing of the Act the common law as laid down in *Angel* v. *Merchants' Marine Insurance Co.* (1) was that the value of the wreck ought not to be added to the estimated cost of repairs, and the Legislature probably thinking that that was the common law simply adopted it. The observations of Lord Loreburn L.C. in *Macbeth & Co.* v. *Maritime Insurance Co.* (2) considerably assist my reading of the Act. "The question"—whether or not the selling value of the wreck ought to be added to the cost of repairs—"admits of ready answer as soon as it is ascertained what is the true test by which a Court is to be guided. Really the choice lies between two. One is that a ship has become a constructive total loss if the cost of repairing her would exceed her value when repaired. The other is that she has become so when a prudent uninsured owner would not repair her having regard to all the circumstances. If the former test be adopted, then this appeal must be dismissed, because the cost of repairs here is 11,000*l.* and the repaired value is 12,000*l.* If the latter test be adopted, then the appeal must be allowed; for no sensible man would have repaired this ship if he could have made a better thing of it by selling her as a wreck, and it is found that he could have done so." The first is, in my

(1) [1903] 1 K. B. 811.

(2) [1908] A. C. at pp. 147, 148.

opinion, the test stated in the Act, and therefore those observations of the Lord Chancellor support my view that the value of the wreck ought not to be added to the cost of repairs. If shipowners desire to include the value of the wreck in the account they must in future insert a stipulation to that effect in the policy, which can properly be done because s. 60 is made "subject to any express provision in the policy," just as underwriters frequently very properly insist upon the provision that the insured value shall be taken as the repaired value in ascertaining whether the vessel is a constructive total loss.

Therefore I must decide that the value of the wreck cannot be added to the cost of repairs. (1) The result is that I find that there was no constructive total loss within the re-insurance policy, and judgment must be entered for the defendants.

Judgment for defendants.

Solicitors for plaintiffs: *William A. Crump & Son.*
Solicitors for defendants: *Thomas Cooper & Co.*

(1) The learned judge then said that perhaps he ought to express his opinion as to the value of the wreck, as there might be an appeal, and upon the evidence he could not place the value, that is to say, the break-up value, higher than $3000, which if added to the cost of repairs would not bring the total up to $34,000.

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Jan. 12.

THE MAYOR, ALDERMEN, AND BURGESSES OF SWANSEA, APPELLANTS *v.* HARPUR, RESPONDENT.

Waterworks—Breaking up Streets—Laying Water Pipe therein—Subsequent Subsidence of Street—Cost of Repair—"Compensation for any damage"—"Recovery of damages not specially provided for"—Waterworks Clauses Act, 1847 (10 *&* 11 *Vict. c.* 17) *ss.* 28, 85.

By s. 28 of the Waterworks Clauses Act, 1847, the undertakers may open and break up the soil of the several streets within the limits of the special Act and lay down pipes within the same, "doing as little damage as can be in the execution of the powers hereby or by the special Act granted, and making compensation for any damage which may be done in the execution of such powers." By s. 85, "with respect to the recovery of damages not specially provided for" the Railways Clauses Consolidation Act, 1845, is incorporated with that and the special Act; and by s. 140 of the Railways Clauses Consolidation Act, 1845, the amount of such damages shall, in case of dispute, be ascertained and determined by two justices.

Undertakers for the supply of water to a borough under a special Act which incorporated the Lands Clauses Consolidation Act, 1845, and the Waterworks Clauses Act, 1847, under their statutory powers opened and broke up the soil of a public road, which was within the district of and repairable by the county council, and laid a water pipe therein, and the road was then filled in and restored to its original condition. The whole of the work was carried out in a proper, efficient, and workmanlike manner under the superintendence of the surveyor to the county council. Eight months after the completion of the work a portion of the road and a bank supporting it slipped, and the county council repaired the damage at a cost of 87*l.* The damage was the result of laying the water pipe in the road. The county council preferred a complaint before two justices under s. 28 of the Waterworks Clauses Act, 1847, to recover the cost of repairing the damage:—

Held, that the claim was properly made under s. 28 of the Waterworks Clauses Act, 1847, as being a claim for compensation for damage done in the execution of the undertakers' powers; that the compensation claimed was "damages" the recovery of which was not specially provided for within the meaning of s. 85; and that therefore under s. 140 of the Railways Clauses Consolidation Act, 1845, two justices had jurisdiction to ascertain and determine the amount of such damages.

CASE stated by justices of the county of Brecon.

A complaint was preferred by the respondent, the surveyor to

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the county council of Brecon, against the appellants under s. 28 of the Waterworks Clauses Act, 1847, which was incorporated in the Swansea Corporation Water Act, 1905 (1), for that on December 16, 1910, at the parish of Ystradgynlais, in the county of Brecon, the appellants, being the persons authorized by the Swansea Corporation Water Act, 1905, to open and break up the soil of a certain road situate in the parish of Ystradgynlais, doing as little damage as might be, and making compensation for any damage done in the execution of the powers conferred upon them by the Act, did so damage the said road as to cause a portion thereof to give way and fall into the river adjoining thereto, the said road being vested in the county council of Brecon, who were responsible for its maintenance and who were entitled to be paid compensation in respect of the said damage in accordance with the provisions of the said Act and of the Waterworks Clauses Act, 1847, therewith incorporated. The sum claimed in the particulars of claim was 87*l.* 10*s.* for building a retaining wall and other works in making good the damage caused by the slipping of the road.

Upon the hearing the following facts were proved or admitted.

Under the Swansea Corporation Water Act, 1905, the appellants laid a water pipe, 24 inches in diameter, in a certain highway in the county of Brecon known as the Ystradgynlais main road, which was in the district of and repairable and maintainable by the county council of Brecon, to carry water from the appellants' reservoir at Cray, in the county of Brecon, to Morriston, in the county borough of Swansea, for the purposes of the water undertaking.

On December 16, 1910, more than eight months after the laying of the water pipe was completed, a portion of the highway and the river bank supporting it to the extent of 50 feet slipped into the river.

The work of cutting the trench and of laying the water pipe therein was carried out in accordance with deposited parliamentary plans in a proper, efficient, and workmanlike manner after notice served upon the respondent, who made no objection to the position of the water pipe in the highway, and the statutory powers

(1) See note on p. 24, post.

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in connection with such work were properly and duly complied with. After the water pipe had been laid in the trench the same was filled, rammed or punned, and the road was restored to its original condition. The trench was opened, the water pipe laid, and the road reinstated in the presence and under the superintendence of the respondent, his officers or servants.

It was contended on behalf of the respondent that the damage done to the road in question, which caused a portion thereof to give way and fall into the river adjoining, was due to the laying by the appellants of a line of pipes in the highway as above stated under their powers contained in the Swansea Corporation Water Act, 1905, and that the respondent was entitled to be paid compensation for the damage done under s. 28 of the Waterworks Clauses Act, 1847.

It was contended on behalf of the appellants that the damage, even if caused by the appellants' operations, which was not admitted, was not within s. 28 of the Waterworks Clauses Act, 1847, under which the complaint was brought, and that even if compensation were payable under that section, which was not admitted, s. 85 of the Act, dealing with the recovery of damages not specially provided for, did not empower the recovery of "compensation," and also that such section, incorporating s. 140 of the Railways Clauses Consolidation Act, 1845, did not give the justices jurisdiction to deal with the complaint.

The justices were of opinion that the damage to the portion of the highway and the river bank was the result of the appellants laying the water pipe in the highway as aforesaid. They were further of opinion that the claim was properly made under s. 28 of the Waterworks Clauses Act, 1847, and that they had jurisdiction to deal with such claim under the sections hereinbefore referred to. They therefore ordered the appellants to pay to the respondent the cost of the repair of the highway, namely 87*l.* 10*s.*, and his taxed costs.

The questions for the opinion of the Court were whether, upon the above statement of facts, the damage, if caused by the appellants' operations, was within s. 28 of the Waterworks Clauses Act, 1847, and, if within that section, whether s. 85 of the Act, incorporating s. 140 of the Railways Clauses Consolidation Act,

1845, applied, and gave jurisdiction to the justices to deal with the complant.

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Macmorran, K.C., and *Cuthbertson*, for the appellants. Sect. 28 of the Waterworks Clauses Act, 1847, does not apply to this case, and there was no jurisdiction to assess compensation. That section applies to compensation for any damage which may be done in the execution of the powers thereby or by the special Act granted, that is, the power to open and break up streets and lay pipes. The damage here was not done "in the execution of the powers" conferred by the Waterworks Clauses Act, 1847, or by the special Act; it occurred long after, and as the work of opening up the road and laying the pipe was properly carried out, no action would lie for negligence in carrying out the work. Where works are authorized by statute and carried on without negligence the undertakers are not in general liable to an action or other proceeding for nuisance unless expressly rendered so liable by statute. For instance, under s. 29 of the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), and s. 9 of the Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), the undertakers are liable to an indictment or action for a nuisance caused by them; and in *Midwood & Co.* v. *Manchester Corporation* (1) undertakers for the supply of electrical energy were held similarly liable under a clause in their provisional order. There is no such provision in the Waterworks Clauses Act, 1847.

Even if compensation is payable under s. 28 of the Waterworks Clauses Act, 1847, s. 85 of the Act, under which the respondent alleges that the compensation is assessable, does not apply. Sect. 85 only applies to "the recovery of damages not specially provided for." There is no question of "damages" in this case. The claim under s. 28 is for "compensation" for damage done in the execution of the undertakers' powers. "Compensation" is a well-known technical term, and the recovery thereof is specially provided for in s. 6 of the Act, which provides that the amount of such compensation shall be determined in the manner provided by the Lands Clauses Consolidation Acts. The proper course, therefore, was for the county council to have taken proceedings under the Lands Clauses Consolidation Act, 1845,

(1) [1905] 2 K. B. 597.

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to recover compensation for injurious affection of the land caused by the execution of the works, and as the amount claimed exceeded 50*l.*, the method of assessing the compensation would be by arbitration or by the verdict of a jury, and the justices had no jurisdiction to assess it. Sect. 6 of the Waterworks Clauses Act, 1847, is as wide as possible, and gives compensation to persons "interested in any lands" injuriously affected by the "maintenance of the works." The county council are persons interested in the road which was damaged by the maintenance of the pipes laid along it. The recovery of compensation is therefore specially provided for in s. 6 of the Act, and s. 85, which applies s. 140 of the Railways Clauses Consolidation Act, 1845, to cases where the recovery of damages is not specially provided for, is not applicable. The word "damages" occurs in ss. 34, 56, and 74, and s. 85 applies to damages payable under those sections. The decision of the justices was therefore wrong.

J. Sankey, K.C., and *H. S. Stowe*, for the respondent. Sect. 6 of the Waterworks Clauses Act, 1847, is the first of a group of sections—ss. 6 to 15—dealing with the construction of waterworks, where the undertakers are empowered by their special Act compulsorily to "take or use any lands or streams." The appellants have not "taken" any lands from the county council. They have simply exercised the powers conferred upon them by s. 28 of breaking up the road and laying a water pipe therein. The next group of sections—ss. 16 and 17—deals with the construction of works for the accommodation of lands adjoining or near the waterworks. The third group—ss. 18 to 27—deals with mines and minerals lying under the land taken, or lying under or near the works of the undertakers. All those groups of sections deal with the taking of private property, and the scheme of this part of the Act is that if any lands or streams are compulsorily taken, compensation is to be assessed under the Lands Clauses Consolidation Act, 1845; if any accommodation works have to be constructed, any difference arising thereon shall be determined by two justices; and in the case of mines and minerals any question of compensation is to be settled as therein provided. The present case does not come within any of those sections. It is not a case of land being taken under

s. 6, for, if it were, a notice to treat would have been necessary. The appellants have merely exercised the powers conferred upon them by s. 28 of the Waterworks Clauses Act, 1847—which is the first of a group of sections, ss. 28 to 34, dealing with the breaking up of streets for the purpose of laying pipes—of opening and breaking up the street and laying a pipe therein. That group of sections deals with public highways, and not with private property. The highway authority have no claim to compensation for the taking of any part of the subsoil of the street for the purpose of laying the pipes. They have only a claim for compensation for any damage done in the execution of the powers conferred upon the undertakers. There is no question of "compensation," in the technical sense of that word, under s. 28. "Compensation for any damage" in s. 28 has the same meaning as "damages" in s. 85. It cannot have been intended that one tribunal should assess the damage under s. 28, and another tribunal the expenses to be recovered in the same way as damages under s. 34, both sections being in the same group. The recovery of the compensation for damage under s. 28 is not specially provided for, and s. 85 applies. That being so, s. 140 of the Railways Clauses Consolidation Act, 1845, applies, and the justices had jurisdiction to assess the amount of the compensation.

Cuthbertson in reply.

LORD ALVERSTONE C.J. This case raises a somewhat difficult question, but I have come to the conclusion that the decision of the justices is right. In my opinion it is impossible to decide the case by drawing a rigid distinction between "compensation" for damage and "damages" throughout the Waterworks Clauses Act, 1847. In order to ascertain the meaning which those words respectively bear in any particular instance one must look at the scheme of the legislation. Sect. 6 prima facie deals with the acquisition by the undertakers of private property for the purpose of constructing waterworks, following a similar provision in s. 6 of the Railways Clauses Consolidation Act, 1845, and it provides that where the undertakers are empowered to take or use any lands or streams otherwise than

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with the consent of the owners and occupiers thereof they shall make to the owners and occupiers of and all other parties interested in any lands or streams taken or used or injuriously affected by the construction or maintenance of the works or otherwise by the execution of their powers full compensation for the value of the lands and streams so taken or used, and for all damage sustained by such owners, occupiers, and other persons by reason of the exercise of their powers. There might be cases where the undertakers were empowered to take a private road, and where they would have to give a notice to treat in respect thereof, and if so s. 6 would apply to such a case. Sects. 6 to 27 deal with the acquisition of or interference with private property for which compensation has to be paid. Sect. 28 is the first of a group of sections dealing with a different subject-matter. That group of sections comes under the heading, "And with respect to the breaking up of streets for the purpose of laying pipes, be it enacted as follows." That heading indicates that the group of sections to which it relates is not intended to deal with the taking or using of lands or streams by a notice to treat or the injurious affection thereof. They deal with the breaking up of public streets for the purpose of laying pipes therein. Sect. 28 confers on the undertakers power to open and break up public streets for that purpose, while at the same time s. 29 provides that "nothing herein contained shall authorize or empower the undertakers to lay down or place any pipe . . . . in any land not dedicated to public use without the consent of the owners and occupiers thereof"; and ss. 30 and 31 impose a control upon the powers conferred by s. 28 by providing that notice shall be given of the intention to break up the street, and that the work shall be done under the superintendence of the persons having the control or management thereof or of their officer. Sect. 28 concludes by saying, "doing as little damage as can be in the execution of the powers hereby or by the special Act granted, and making compensation for any damage which may be done in the execution of such powers." At first I was inclined to think that, inasmuch as it might be ascertained, as soon as it was proposed to break up a street and lay a pipe therein, that some damage would or might be caused by the road not being able properly to

bear the weight of the pipe when filled with water, and that therefore the mere fact of breaking up the road and laying the pipe therein would cause injurious affection thereof, in such a case s. 6 would apply. But upon further consideration that does not seem to me to be the correct view of s. 28. "Compensation" in that section is used to express payment for damage which has actually been occasioned by the breaking up of the streets and laying pipes therein, and is not used in the technical sense contended for by the appellants. This view is to a certain extent confirmed by ss. 32 to 34 under the same heading, which require the undertakers to reinstate the road without delay and to fence and light it when broken up, and impose a penalty for neglect to do so, and if any such delay or omission takes place the persons having the control or management of the street may cause the work so delayed or omitted to be executed, and the expense of executing the same shall be repaid to such persons by the undertakers, and may be recovered in the same way as damages are recoverable under this and the special Act. This group of sections is dealing with something different from that of mere compensation for damage which will be caused by the execution of the works. I have therefore arrived at the conclusion that this is a case in which the recovery of damages is not specially provided for, and accordingly s. 85 brings into operation s. 140 of the Railways Clauses Consolidation Act, 1845, which provides that in such case the amount shall be ascertained and determined by two justices. The justices have found as a fact that the damage done to the road was the result of the appellants' laying their pipe in the highway, and they have ordered the appellants to pay to the respondent 87*l.* 10*s.* as the cost of making good the damage. It is not "compensation" in the technical sense of the word, so as to require assessment under the Lands Clauses Consolidation Act, 1845. It is in the nature of damages in respect of the injury to the highway, and the amount has to be ascertained and determined by two justices.

The appeal must be dismissed.

PICKFORD J. I am of the same opinion.

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AVORY J. I am of the same opinion. The justices have found that the damage done to the highway came within s. 28 of the Waterworks Clauses Act, 1847, as being damage done in the execution of the powers vested in the appellants. It seems to me that there is no method specially provided either by the special Act or by the Waterworks Clauses Act, 1847, of recovering the amount of the damage to which the respondents are entitled under s. 28. That being so, s. 85 of the Act of 1847 imports s. 140 of the Railways Clauses Consolidation Act, 1845, which applies "in all cases where any damages, costs, or expenses are by this or the special Act, or any Act incorporated therewith, directed to be paid, and the method of ascertaining the amount or enforcing the payment thereof is not provided for." If the case came within s. 6 of the Waterworks Clauses Act, 1847, then in my opinion s. 140 of the Railways Clauses Consolidation Act, 1845, would have no application. I am satisfied, however, for the reasons given by my Lord that the case is not within s. 6 of the Act of 1847.

Appeal dismissed.

Solicitors for appellants: *Sharpe, Pritchard & Co., for H. Lang Coath, Swansea.*

Solicitors for respondent: *Field, Roscoe & Co., for D. W. E. & M. F. Thomas, Brecon.*

NOTE.—Swansea Corporation Water Act, 1905 (5 Edw. 7, c. xciv.), s. 2: "The following Acts (so far as the same are applicable for the purposes and are not inconsistent with the provisions of this Act) are hereby incorporated with this Act (namely):—

"(1.) The Waterworks Clauses Acts, 1847 and 1863, except—

"(*a*) The words 'with the consent in writing of the owner or reputed owner of any such house or of the agent of such owner' in section 44 of the Waterworks Clauses Act, 1847;

"(*b*) Sections 75 to 82 of the Waterworks Clauses Act, 1847, with respect to the amount of profit to be received by the undertakers when the waterworks are carried on for their benefit, and section 83 relating to accounts:

"(2.) The Lands Clauses Acts (except s. 127 of the Lands Clauses Consolidation Act, 1845)."

Sect. 12: "(1.) The provisions of the Waterworks Clauses Act, 1847, with respect to the breaking up of streets shall apply with the necessary

modifications to the construction, laying down, erection, and maintenance in any streets or roads of the aqueducts authorised by this Act, and of any discharge pipes, telephone or telegraph posts, wires, conductors, or apparatus, which the corporation may and which they are hereby authorised to erect or lay down for the purposes of their water undertaking."

Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 6: "Where by the special Act the undertakers shall be empowered, for the purpose of constructing or supplying waterworks, to take or use any lands or streams otherwise than with the consent of the owners and occupiers thereof, they shall, in exercising the power so given to them, be subject to the provisions and restrictions contained in this Act, and, if the waterworks be situated in England or Ireland, to the provisions and restrictions contained in the Lands Clauses Consolidation Act, 1845 . . . . and shall make to the owners and occupiers of and all other parties interested in any lands or streams taken or used for the purposes of the special Act, or injuriously affected by the construction or maintenance of the works thereby authorised, or otherwise by the execution of the powers thereby conferred, full compensation for the value of the lands and streams so taken or used, and for all damage sustained by such owners, occupiers, and other persons by reason of the exercise, as to such lands and streams, of the powers vested in the undertakers by this or the special Act or any Act incorporated therewith; and, except where otherwise provided by this or the special Act, the amount of such compensation shall be determined in the manner provided by the said Lands Clauses Consolidation Acts respectively for determining questions of compensation with regard to lands purchased or taken under the provisions thereof . . . ."

Sect. 28 (under the heading, "And with respect to the breaking up of streets for the purpose of laying pipes, be it enacted as follows"): "The undertakers, under such superintendence as is hereinafter specified, may open and break up the soil and pavement of the several streets and bridges within the limits of the special Act, and may open and break up any sewers, drains, or tunnels within or under such streets and bridges, and lay down and place within the same limits pipes, conduits, service pipes, and other works and engines, and from time to time repair, alter, or remove the same, and for the purposes aforesaid remove and use all earth and materials in and under such streets and bridges, and do all other acts which the undertakers shall from time to time deem necessary for supplying water to the inhabitants of the district included within the said limits, doing as little damage as can be in the execution of the powers hereby or by the special Act granted, and making compensation for any damage which may be done in the execution of such powers."

Sect. 85 (under the heading, "And with respect to the recovery of damages not specially provided for, and of penalties, and to the determination of any other matter referred to justices or to the sheriff, be it enacted as follows"): "If the waterworks be in England or Ireland the clauses of the Railways Clauses Consolidation Act, 1845, with respect to the recovery of damages not specially provided for, and of penalties, and to the determination of any other matter referred to justices, shall be incorporated with this and the special Act . . . ."

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Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 140 (under the heading, "And with respect to the recovery of damages not specially provided for, and of penalties, and to the determination of any other matter referred to justices, be it enacted as follows"): "In all cases where any damages, costs, or expenses are by this or the special Act, or any Act incorporated therewith, directed to be paid, and the method of ascertaining the amount or enforcing the payment thereof is not provided for, such amount, in case of dispute, shall be ascertained and determined by two justices . . . ."

W. F. B.

C. A.

1911 *Dec.* 18, 20;

1912 *Feb.* 7.

[IN THE COURT OF APPEAL.]

GODWIN *v.* THE LORDS COMMISSIONERS OF THE ADMIRALTY.

Employer and Workmen—Compensation—Contracting out—Scheme of Compensation—Re-certification—Ballot—Jurisdiction of County Court Judge—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 3, *sub-s.* 1; *s.* 15, *sub-ss.* 2 *and* 3. (1)

On re-certification under s. 15 of the Workmen's Compensation Act, 1906, of a scheme of compensation which has been certified under the Workmen's Compensation Act, 1897, it is not necessary that a ballot of the workmen should be taken before the registrar can re-certify.

The applicant had been employed in the Portsmouth Dockyard as a

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(1) Workmen's Compensation Act, 1906, s. 3: "(1). If the Registrar of Friendly Societies, after taking steps to ascertain the views of the employer and workmen, certifies that any scheme of compensation, benefit, or insurance for the workmen of an employer in any employment whether or not such scheme includes other employers and their workmen, provides scales of compensation not less favourable to the workmen and their dependants than the corresponding scales contained in this Act, and that, where the scheme provides for contributions by the workmen, the scheme confers benefits at least equivalent to those contributions, in addition to the benefits to which the workmen would have been entitled under this Act, and that a majority (to be ascertained by ballot) of the workmen to whom the scheme is applicable are in favour of such scheme, the employer may, whilst the certificate is in force, contract with any of his workmen that the provisions of this scheme shall be substituted for the provisions of this Act, and thereupon the employer shall be liable only in accordance with the scheme, but save as aforesaid the Act shall apply notwithstanding any contract to the contrary made after the commencement of this Act."

Sect. 15: "(2.) Every scheme under the Workmen's Compensation Act, 1897, in force at the commencement of this Act shall, if re-certified by the

bricklayer for about twenty years, and in May, 1908, in the course of his employment he met with an accident which resulted in January, 1910, in his being returned unfit for service. He was dissatisfied with the compensation offered by the respondents and applied to the county court to settle the amount. The respondents answered that he had contracted with them to be bound by a scheme of compensation certified and re-certified by the Registrar of Friendly Societies, by which compensation was to be fixed by the Treasury; and they contended that the county court judge had no jurisdiction to hear the application. It was admitted that there had not been any ballot of workmen in the respondents' employment prior to the re-certification of the scheme; and the applicant contended that on that ground the certificate was invalid:—

Held (by Cozens-Hardy M.R. and Farwell L.J., Fletcher Moulton L.J. dissenting), that it was not necessary that a ballot should be taken before the registrar could re-certify; that the certificate was valid and the applicant was bound by the scheme; and that the county court judge had no jurisdiction to hear the application.

APPEAL from an award of the county court judge of Portsmouth sitting as arbitrator under the Workmen's Compensation Act, 1906.

Frederick Godwin, the applicant, had been employed by the Lords Commissioners of the Admiralty as a bricklayer in His Majesty's dockyard at Portsmouth for about twenty years, and on May 23, 1908, while following his employment, was injured in his right hand. On September 9, 1909, he had one of the fingers of his right hand amputated, and in January, 1910, he was returned unfit for service. His average weekly earnings previous to the injury had been 1*l.* 14*s.* 6*d.*; and he had received from the respondents compensation at various rates during the time he was unable to do any work. They then offered him a weekly sum as compensation, but he refused the offer and applied to the county court to fix the compensation. The respondents answered that a scheme of compensation for their workmen had been duly certified and re-certified by the Registrar of Friendly Societies, and his certificate was in force when the applicant received his injury;

Registrar of Friendly Societies, have effect as if it were a scheme under this Act.

"(3.) The registrar shall re-certify any such scheme if it is proved to his satisfaction that the scheme conforms, or has been so modified as to conform, with the provisions of this Act as to schemes."

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that on January 17, 1908, the applicant had signed a contract with them to be bound by the scheme instead of by the provisions of the Workmen's Compensation Act, 1906; and they contended that the county court had no jurisdiction to hear the application. By the scheme it was provided under "B. Incapacity from injury" that (clause 9) "when total or partial incapacity for work continues beyond the period for which the workman receives hurt pay, as provided by clause 5, an allowance shall be paid to him at the following rates during the continuance of the incapacity, viz.; when his capacity to contribute towards his own support has been shown to the satisfaction of the Treasury to have been (1.) totally destroyed, then twenty-four sixtieths; (2.) materially impaired, eighteen sixtieths; (3.) impaired, twelve sixtieths; (4.) slightly impaired six sixtieths, of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not, then during any less period for which he has been in the employment of the Government." (Clause 14) "Any workman who wishes to withdraw from the scheme may do so at any time." On the scheme was a certificate of re-certification as follows:

"No. 71 C. under the Act of 1897 re-certified as No. 116.

"Workmen's Compensation Act, 1906.

"It is hereby certified that the foregoing scheme (No. 71 C. under the Act of 1897) provides scales of compensation not less favourable to the workmen and their dependants than the corresponding scales contained in the Workmen's Compensation Act, 1906. If not renewed this certificate is to expire on the 30th day of June, 1913. Dated the 16th day of December, 1907."

This certificate was signed by the Registrar of Friendly Societies. It was admitted that there had never been any ballot of the workmen in the respondents' employment within the terms of s. 3 of the Act of 1906 prior to the re-certification of the scheme.

The learned county court judge followed *Horn* v. *Lords Commissioners of the Admiralty* (1) and dismissed the application on the ground that he had no jurisdiction to hear it.

The applicant appealed.

(1) [1911] 1 K. B. 24.

1911. Dec. 18. *Sir Alfred Cripps, K.C.*, and *Harold Morris*, for the appellant. *Horn* v. *Lords Commissioners of the Admiralty* (1) was wholly unlike this case; it did not refer in any way to the necessity of taking a ballot of the workmen on re-certifying a scheme; and all the conditions had been complied with. The appellant submits that in this case the scheme was not validly re-certified and therefore that there is no scheme which can interfere with the jurisdiction of the county court judge. Under the Workmen's Compensation Act, 1897, schemes of compensation were provided for by s. 3, and no ballot was required, although the views of the employer and workmen had to be ascertained. Sect. 3 of the Act of 1906 provides for schemes under that Act and makes a ballot of the workmen necessary. Sect. 15 provides that the registrar may re-certify a scheme if (sub-s. 3) it conforms with the provisions of the Act of 1906 as to schemes. One of the provisions of the Act as to schemes is that there should be a ballot, and until a ballot has been taken the scheme cannot conform and the registrar cannot re-certify. The Regulations and Forms of July 1, 1907, actually provide that a ballot shall be taken before re-certification.

Sir Rufus Isaacs, A.-G., and *B. A. Cohen*, for the respondents. It is not necessary that a ballot of the workmen should be taken before a scheme certified under the Act of 1897 can be re-certified under the Act of 1906. It is true that the Regulations and Forms of July 1, 1907, provide for a ballot, but so far as that provision is concerned they are ultra vires. Sect. 15 of the Act of 1906 says nothing about a ballot and no power is given to make regulations under that section. The only power is contained in s, 3, sub-s. 8, and it refers to that section only. The regulations have never been altered, but the mistake was recognized from the first, and in practice a ballot has never been asked for on re-certification. By s. 15, sub-s. 3, the registrar is to re-certify a scheme if it conforms or has been so modified as to conform with the provisions of the Act as to schemes. A ballot is a condition precedent to the making of a scheme; it is not a provision of the scheme. What is meant by sub-s. 3 of s. 15 is that the benefits to the workmen must be as great in a re-certified scheme as in the old scheme. That is shewn by sub-s. 4, which treats an

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old scheme as actually in operation. Under s. 3 of the Act of 1897 no ballot was necessary, but the registrar had to ascertain the wishes of the employer and workmen, and that was done in this case. There is nothing to make all the requirements of s. 3 of the Act of 1906 applicable to re-certification of an old scheme under s. 15. That section was intended to keep old schemes alive, not to produce new ones. A ballot cannot make an old scheme conform with the provisions of the present Act. This is a valid scheme and has been properly re-certified; the appellant is bound by his contract; the county court judge was right, and the question of compensation is left to the Treasury.

This Court has jurisdiction to hear the appeal: *Moss* v. *Great Eastern Ry. Co.* (1) The respondents do not contend that *Horn* v. *Lords Commissioners of the Admiralty* (2) has any bearing on this point.

Sir Alfred Cripps, K.C., in reply.

Cur. adv. vult.

1912. Feb. 7. COZENS-HARDY M.R. The appellant is a bricklayer employed in the dockyard at Portsmouth. He was injured by an accident and he claimed compensation under the Workmen's Compensation Act, 1906. He was met by the defence that he had contracted himself out of the Act, and that in conformity with the decision of this Court in *Horn* v. *Lords Commissioners of the Admiralty* (2) the county court judge had no jurisdiction. The county court judge acquiesced in this view and the workman has appealed. Under the old Act of 1897 a scheme might be certified by the Registrar of Friendly Societies. Before certifying he was bound to take steps to ascertain the views of the employer and workmen and to certify that the scheme was on the whole not less favourable to the general body of workmen and their dependants than the provisions of the Act, and a workman was then authorized to contract that the provisions of the scheme should be substituted for the provisions of the Act. A scheme of compensation in case of injury to workmen in Government establishments was certified under that section. The Act of 1897 has been repealed by the Act of 1906, and there are some material changes introduced by

(1) [1909] 2 K. B. 274. (2) [1911] 1 K. B. 24.

that Act. By s. 3, sub-s. 1, the registrar is bound to certify, in the case of a new scheme, not only whether it provides scales of compensation not less favourable to the workmen and their dependants than the corresponding scales contained in the Act, but also that a majority (to be ascertained by ballot) of the workmen to whom the scheme is applicable are favourable to the scheme. And it is provided that so long as the certificate is in force the employer may contract with any of his workmen that the provisions of the scheme shall be substituted for the provisions of the Act. Sub-s. 2 empowers the registrar to give a certificate to expire at the end of a term of not less than five years, and from time to time to renew, with or without modification, such certificate. By sub-s. 3 no scheme can be certified which imposes an obligation to join the scheme, or which does not contain provisions enabling a workman to withdraw from the scheme. Sub-sect. 4 enables the registrar to revoke a certificate in proper cases, and sub-s. 8 states that the registrar may make regulations for the purpose of carrying this section into effect. It is obvious that thus far the Act has no operation upon schemes under the former Act. This matter is dealt with under s. 15. Sub-ss. 2, 3, and 4 of s. 15 are as follows: "(2.) Every scheme under the Workmen's Compensation Act, 1897, in force at the commencement of this Act shall, if re-certified by the Registrar of Friendly Societies, have effect as if it were a scheme under this Act. (3.) The registrar shall re-certify any such scheme if it is proved to his satisfaction that the scheme conforms, or has been so modified as to conform, with the provisions of this Act as to schemes. (4.) If any such scheme has not been so re-certified before the expiration of six months from the commencement of this Act, the certificate thereof shall be revoked." The registrar on December 16, 1907, gave a certificate in the following terms:—"It is hereby certified that the foregoing scheme . . . . provides scales of compensation not less favourable to the workmen and their dependants than the corresponding scales contained in the Workmen's Compensation Act, 1906. If not renewed this certificate is to expire on the 30th June, 1913." In fact certain small modifications in favour of the workmen were made in the old scheme. On

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January 17, 1908, Godwin signed a contract agreeing to accept the provisions of the scheme in lieu of the provisions of the Act of 1906. The only ground relied upon by the appellant is that no ballot was taken prior to the re-certification such as is required by s. 3, and the question for our consideration is whether any such ballot is necessary before the registrar can re-certify. In my opinion no such ballot is necessary. There are certain conditions precedent to the making of a scheme under s. 3, one of which is the taking a ballot, but that is not one of the provisions of the scheme. For that purpose the scheme itself must alone be looked at. In my opinion the words used in s. 15, sub-s. 3, only require the registrar to look at the scheme itself and see whether it conforms, with or without modifications, with the provisions of the Act as to schemes. Those provisions are to be found in s. 3, sub-s. 1 and sub-s. 3. I can see no justification for insisting upon a fresh ballot at the end of a term of years, either in the case of a renewal under s. 3, sub-s. 2, or in the case of re-certification under s. 15. There is no hardship involved, for any workmen can withdraw, and any of the workmen may combine to apply to the registrar to revoke his certificate.

It has been brought to our notice that the registrar in July, 1907, issued certain regulations by which he purported to prescribe the particular form of application under s. 15, which form contained a statement that there had been a ballot. In my opinion the registrar has only power to make regulations for the purpose of carrying s. 3 into effect, and the regulations, in so far as they deal with s. 15, have no authority. It follows from what I have said that the view indicated in those regulations is not in my opinion sound, and we have been informed by the Attorney-General that the practice of the office has not been in accordance with the printed regulations.

In my opinion the objection taken to the jurisdiction of the county court judge as arbitrator was valid, and this appeal must be dismissed.

FLETCHER MOULTON L.J. The question raised by this appeal relates to the steps statutorily necessary to give to what is known as a certified scheme under the Workmen's Compensation Act of

1897 the status of a certified scheme under the Workmen's Compensation Act, 1906. The matter turns entirely on the interpretation to be given to ss. 3 and 15 of the present Act. There is no doubt that s. 15 leaves much to be desired in the matter of clearness. The interpretation which I feel bound to put upon it differs from that approved of by my brethren; and were the matter purely a technical one, I should have contented myself with intimating my dissent; but as it is not without a certain practical importance, I shall proceed to state my reasons.

We are dealing here with the legislative provisions which regulate the power of the workman to contract himself out of the benefits of the Act. There is no general power so to do. Under both Acts the power of contracting out is limited to the substitution of the provisions of what is ordinarily termed a certified scheme for the provisions of the Act as to compensation. But the provisions as to certification are different under the two Acts; and the particular question raised by this appeal depends, as I have said, on the provisions for transforming a certified scheme under the earlier Act into a certified scheme under the later Act. We must, therefore, examine the provisions of both Acts in relation to contracting out.

The broad policy of the Act of 1897 with regard to contracting out is to be found in s. 3, sub-s. 1. It provides that the employer may contract with his workmen that the provisions of a certified scheme shall be substituted for the provisions of the Act, "but save as aforesaid this Act shall apply notwithstanding any contract to the contrary made after the commencement of the Act." This deals with all future contracts, but does not touch those that have been made before the Act and are still existing. These are very summarily dealt with in s. 9. They are deemed to have ceased at the time at which the workman's contract of service would have determined if notice of the termination thereof had been given at the commencement of the Act.

Matters continued in this position until 1906, when the present Workmen's Compensation Act was passed. It differed from the previous Acts both in the persons to whom it applied and the benefits secured by it. But in its essence it followed the same lines of policy. It was an extension and an amplification of the

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earlier Acts, and was intended to take their place entirely, and therefore provided for their repeal except so far as related to accidents occurring before it came into operation.

With regard to contracting out, the Act of 1906 followed the same general lines as the earlier Act. Sect. 3, sub-s. 1, is a repetition of s. 3, sub-s. 1, of the Act of 1897, except that the provisions as to certification are considerably modified. But the question of existing contracts could not be dealt with quite so summarily as in the former case. There existed groups of contracts entered into by employers and workmen under the sanction of the previous Act, whereby they mutually agreed to substitute the provisions of a certified scheme for those of the Act. These contracts merited gentler handling. Accordingly s. 15 of the Act of 1906 differs widely from s. 9 of the Act of 1897. It treats all existing contracts which do not relate to certified schemes in the same way as before. They are to be deemed to have come to an end at the date at which the service would have come to an end if a notice to terminate it had been given on the passing of the Act. But contracts under certified schemes are expressly excepted from this provision. They are not terminated by any provision of the Act, but a period of six months is provided within which time such a certified scheme may be re-certified under the 1906 Act, and if this is not done the original certificate is revoked. This contractually terminates all the contracts under the scheme, because by s. 3 of the previous Act, under which they were made, they only last until the certificate is revoked. On being so re-certified, a scheme under the earlier Act is to have the same effect as a scheme under the present Act.

All this appears plain and simple. The difficulty of the case begins to present itself when we inquire what is the meaning of the word "certify." One would naturally expect that it meant that the registrar gave a certificate that the scheme was a fit and proper scheme to be substituted for the provisions of the Act. But it is not so. Under neither of the Acts has the Registrar of Friendly Societies to give any such certificate; nor would any such certificate have any legal force or effect. Take, for example, the certificate

under the later Act. It must certify three things: (1.) that the scheme provides scales of compensation not less favourable to the workmen and their dependants than the corresponding scale of the Act; (2.) that if it be a contributory scheme, the additional benefits are at least equal to the contributions; (3.) that a ballot has shewn that a majority of the workmen are in favour of it. No other certificate complies with s. 3, sub-s. 1, and unless such a certificate exists, no contract made after the passing of the Act is a bar to the operation of the Act. Under the earlier Act the provisions as to the contents of the certificate were different. Under that Act, the registrar must certify "that the scheme is on the whole not less favourable to the general body of workmen and their dependants than the provisions of the Act." This is not the same as any one of the three facts which must be certified under the present Act. It resembles the first of the three, but differs materially from it both in its nature and in the fact that the comparison is to be made with the provisions of a different Act.

Now what has the registrar done in this case? He has given the following certificate:—"It is hereby certified that the foregoing scheme (No. 71 C. under the Act of 1897) provides scales of compensation not less favourable to the workmen and their dependants than the corresponding scales contained in the Workmen's Compensation Act, 1906." He has therefore given a certificate which is not in such a form as to give it any legal effect under either Act. It is clear that the fact certified is not that required by the Act of 1897 and it does not contain those matters which are required to constitute a certificate under the Act of 1906.

How can such a certificate have any legal effect? I can see only two possible interpretations to the word "re-certify" which appears in s. 15 of the present Act. It may mean to give over again the certificate previously given or it may mean to go once more through the operation of certifying. I do not think that the former of these is the correct interpretation, but it is at all events intelligible. In that case the certificate of the registrar must be in the old form, which is not the case. Taking the second interpretation, which is in my opinion the right one, the

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registrar must once more certify. But "certify" now has only the one meaning which is given to it by s. 3, sub-s. 1, of the present Act. It has no other signification whatever. The so-called certificate of the registrar in this case is therefore not a certificate within the meaning of the Act.

The consideration which I think has principally influenced my brethren in coming to a different conclusion is that they regard the matter of the favourable ballot of the workmen as being merely a condition precedent and not intended to apply to an old scheme. But it is not merely a condition precedent. It is an essential part of a certificate under the Act of 1906. One can test this by assuming that a certificate has been given which complies with the requirements of s. 3, sub-s. 1, of that Act, except that it does not state that the ballot has been taken. A scheme so certified could not be made valid by proof at the hearing that in fact the ballot had been taken and the required majority obtained. Yet this evidence would suffice if it were merely a condition precedent. To render a scheme a permissible substitute for the provisions of the Act it does not suffice that the condition (if it can be called so) has in fact been satisfied. It must appear by the certificate that such is the case, and if it does not appear, the certificate is not such as the Act requires and is of no legal effect.

On the short ground, therefore, that the certificate complies with the statutory requirements of neither Act, and therefore has no legal effect under either, I am of opinion that this appeal must succeed. But I do not wish it to be thought that the grounds of my decision apply only to such a certificate as that given in the present case. On the contrary I am of opinion that there must be a certificate in the statutory form in respect of every scheme under the Act of 1906 whether the scheme be an old or a new one. The provisions of s. 3, sub-s. 1, are absolute as far as contracts made after the passing of the Act are concerned. It will be noticed that the language is "save as aforesaid this Act shall apply." It is not "save as in this Act otherwise provided," but "save as aforesaid." It would require the clearest language to make me hold that so far as future contracts are concerned s. 3, sub-s. 1, was controlled or modified by anything in s. 15. It follows therefore that I hold that no scheme is a certified

scheme so far as contracts made after the date of the Act (as was the case here) are concerned unless such a certificate as is prescribed in s. 3, sub-s. 1, exists.

I find no difficulty in giving a proper interpretation to the provisions of s. 15 in accordance with the above. Section 15, like the corresponding section of the old Act, was inserted solely for the purpose of dealing with existing contracts. The re-certifying therein referred to is in my opinion the giving of such a certificate as the Act of 1906 prescribes, that is to say, a certificate satisfying the requirements of s. 3, sub-s. 1. The effect of s. 15 is to give continuity to the existing scheme (provided this is done) and so to preserve it in spite of the passing of the Act. Consequently the existing contracts under that scheme need not be made over again. The old scheme has become a scheme under the new Act, and the contracts existing under it continue to bind the parties because they are under a scheme that is duly certified under that Act. Thus full effect is given to s. 15 without interfering with the clear and definite legislation of s. 3, sub-s. 1, as to future contracts.

Even if I thought it was permissible to take into consideration what one might reasonably expect that the Act would provide in cases where there had existed a certified scheme under the Act of 1897 I should come to the same conclusion. The safeguards prescribed by the Act of 1906 are unquestionably numerous. For instance the acceptance of the scheme must not be a condition of employment and the workman must be able to go out of it if he wishes to do so, &c. But in addition to other safeguards the Act requires that the scheme should have been accepted by the workmen on a ballot and that this should be certified by the registrar. If this be required in the case of schemes framed under the Act of 1906, I can imagine no reason why it should not be required in the case of schemes which are to be effective under that Act merely because they or some modifications of them have existed under the previous Act. The provisions of the two Acts are widely different. No ballot was required under the previous Act, and even if it had been required it does not follow that a scheme which would have been acceptable under the earlier Act would be accepted

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under the later Act. Why should large groups of workmen be deprived of this safeguard merely because years ago the firm into the service of which they are entering had a scheme which the registrar thinks has been modified sufficiently to meet the requirements of the new Act? The opinion of the registrar is not accepted in lieu of that of the workmen under the new Act in the case of schemes which are new. What reason is there, therefore, to accept it when the scheme is a modification of one that was framed under the older Act?

I am therefore of opinion that the scheme in this case possessed no certificate to which any legal effect can be given, and that, therefore, it did not prevent the provisions of the Act applying to this case. In my opinion, therefore, this appeal should be allowed.

FARWELL L.J. I agree with the Master of the Rolls that this appeal should be dismissed. The provisions of the Act of 1906, with reference to schemes under which contracting out may be allowed, differ materially from the corresponding provisions in the Act of 1897. Under both Acts the registrar was bound before making his certificate to ascertain the views of both employer and workmen, but under the later Act the means of ascertaining and recording the views of the workmen are provided, and the registrar has to certify that a majority (to be ascertained by ballot) of the workmen to whom the scheme is applicable are in favour of the scheme. The ascertainment of the views of both employer and workmen and the majority on a ballot of the workmen are both conditions precedent to the passing of any scheme. The Act of 1906, by s. 3, sub-s. 2, gives the registrar a new power, namely, to renew the scheme with or without modifications; under the old Act he had power to certify a scheme generally or for a limited time, but if he took the latter course he had no power to renew. (See *Wilson* v. *Ocean Coal Co.* (1)) How any such modifications are to be settled it is not necessary to consider, but I think it plain that the renewal of a scheme under this power does not require any such ballot as was the condition precedent to the creation of the original scheme: a

(1) (1905) 21 Times L. R. 621.

lease which can only be granted with the consent of A., and which contains a renewal clause, does not require any further consent of A. to a renewal, unless it is so provided in express terms, because the lease was granted with A.'s consent containing the renewal clause in general terms. So here the scheme is certified subject to the power of renewal in sub-s. 2, which says nothing about the ballot which was a condition precedent to the existence of the original scheme.

The next alteration is in sub-s. 3, which forbids the registrar to certify any scheme which does not contain provisions enabling a workman to withdraw from the scheme: this is very material, because, under the law as it now stands, a workman can be compelled neither to come in nor (if he has come in) to remain under the scheme. The result is that the Act merely enables the creation of a scheme, which must be certified by the registrar to be not less favourable to the workmen and their dependants than the corresponding scales in the Act, and, if the workman contributes, to confer benefits at least equivalent to those contributions in addition to the benefits under the Act, and to give the workman the free choice between such a scheme and the provisions under the Act with full powers to change his mind and withdraw from such scheme if he chooses.

The Legislature have thought it better to prevent the conferring of this option on the workman unless a majority of the workmen of the particular employer to whom the scheme is to be offered approve of it; but the ballot does not operate to give the workmen any right, but only to deprive them of an option they might otherwise have had. There is no ground therefore on which it can be suggested that the workmen need to be protected by any second ballot.

Apart from any such general consideration, the question turns on the construction of s. 15, read with s. 3. As there were existing schemes under the old Act, it was necessary to make some provision with respect to them. I need not comment on sub-s. 1 of s. 15; the material clauses are sub-ss. 2, 3, and 4, the effect of which is that a scheme re-certified within six months after the passing of the Act has effect as if it were a scheme under the later Act, but such re-certification can only be given by

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the registrar "if it is proved to his satisfaction that the scheme conforms, or has been so modified as to conform, with the provisions of the Act as to schemes."

In my opinion this sub-section treats the scheme as a subsisting scheme duly called into existence and requiring no new birth. The scheme contains no provisions as to ballot: the ballot is not a matter in respect of which the scheme conforms or can be modified so as to conform, for it could not have existed at all unless there had been a ballot; and the registrar's duty is to see that the scheme, so treated as existing, conforms with the provisions of the Act as to its contents: the reference to modifications makes this clear; it is possible to modify the contents of the scheme; it is not possible to modify a condition precedent outside and antecedent to the birth of the scheme.

This appears to me to be the true meaning of the words, and it has at least the merit of causing as little disturbance of the status quo as possible, and it is for the benefit of both the workmen and employers by preserving the option to the former intended to be given to them by the latter.

I agree with the Master of the Rolls' observations on want of jurisdiction to make the regulations purported to have been made by the registrar so far as they deal with s. 15.

Appeal dismissed.

Solicitors: *Shaen, Roscoe, Massey & Co.; Solicitor to the Treasury.*

H. C. R.

[IN THE COURT OF APPEAL.]

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Jan. 29, 30; *Feb.* 27.

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BRICE (SURVEYOR OF TAXES) *v.* NORTHERN ASSURANCE COMPANY.

BRICE (SURVEYOR OF TAXES) *v.* OCEAN ACCIDENT AND GUARANTEE CORPORATION.

Revenue—Income Tax—Company—Foreign Investments—Interest of, not remitted home—Objects of the Company—Adventure—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Sched. D, First, Fourth, and Fifth Cases —Income Tax Act,* 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Sched. D.*

A fire and life insurance company which carried on business both at home and abroad was registered in this country and had its head office and board of direction here. One of the objects mentioned in its memorandum of association was to invest money not immediately required in such manner as might from time to time be determined. By the laws of certain of the foreign States in which it so carried on business an insurance company was required, as a condition of permission to carry on business there, to deposit with the Governments of those countries certain sums of money and to invest those sums in accordance with the local laws. In pursuance of those requirements the company invested certain sums in those States. It also voluntarily invested there other sums representing accumulated profits of its business. Both classes of investments yielded interest which was received by the company abroad, but was not remitted to the United Kingdom:—

Held, that the Crown had an option to tax the income of the foreign investments either under case 1 or case 4 of Sched. D of s. 100 of the Income Tax Act, 1842, but not under both; that the power to invest conferred by the memorandum was not a distinct object of the company; that the business of the company in all its branches was in truth one; and that the whole business came within the word "adventure" in case 1.

Decision of Hamilton J. [1911] 2 K. B. 577, affirmed.

APPEAL from a decision of Hamilton J. (1) on a case stated by the Commissioners of Income Tax.

1. At a meeting of the Commissioners for Special Purposes of the Income Tax Acts held in the city of Westminster on April 4, 1908, and by adjournment on May 1, 1908, and May 26, 1909,

(1) [1911] 2 K. B. 577.

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the Liverpool and London and Globe Insurance Company appealed against the undermentioned assessments made upon them by the additional Commissioners of Income Tax for the division of Liverpool under Sched. D in respect of the profits of the insurance (fire and life) and annuity business carried on by them, namely:

For the year 1903 ended April 5, 1904, in the sum of £104,119.
" " 1904 " " 1905 " " £200,000.
" " 1905 " " 1906 " " £250,000.
" " 1906 " " 1907 " " £250,000.

2. At the hearing of the appeal the following facts were proved:—

(H.) In 1904 an Act of Parliament, 4 Edw. 7, c. xxxiv., was passed providing for the registration of the company under the Companies Acts, 1862 to 1900, and for the substitution of a memorandum and articles of association for its previous constitution and regulation. By clause 18 of the memorandum one of the objects for which the company was established was "To invest the moneys of the company not immediately required in such manner as may from time to time be required."

(I.) The head office of the company is at Liverpool, but it carries on business through agencies and branches not only in the United Kingdom but in the Colonies and abroad. The company has large sums of money invested in various securities, possessions, and properties, some in the United Kingdom, and some in other parts of the world.

(J.) The question raised by this appeal arises with respect to investments in the United States of America, in Canada, and in Australia, in which countries the only business carried on by the company is that of fire insurance.

(K.) The investments in those three countries may be divided into three classes designated for the purposes of this case classes A, B, and C.

(L.) Class A have been made by the company in the United States and in Canada under the following circumstances. In six of the States where the company does business (namely, New York, Ohio, Oregon, Virginia, Georgia, and New Mexico) and in Canada it is required as a condition of a foreign insurance company doing fire insurance business there that the company should

deposit certain minimum amounts with a representative of the Government or trustees who pledge themselves to the Government not to part with the deposits. The sums so deposited must be invested in accordance with the local laws of the said States and Dominion. The company has accordingly been required to make and has made in the States and in the Dominion the various deposits required by law as a condition of carrying on business as aforesaid, and so long as it carries on business therein or any liability remains in respect of any risk in the States or Dominion (as the case may be) they are by law unable to recover possession of any part of the sums so deposited, but the same are held as a fund out of which in the case of non-payment of claims by the company the policy-holders of the company in the said States and Dominion can be paid.

(M.) Class B of the investments have been made by the company in the State of New York and in Canada under the following circumstances. In addition to the obligation imposed by law upon the company to make the fixed deposit mentioned in the preceding paragraph it is also required by law—

(*a*) In New York, that an insurance company doing fire insurance business in the said States may not undertake and keep by way of insurance on any one risk an amount exceeding one-tenth of what is termed in this case "the surplus" of such company. The term "surplus" means the amount which is arrived at by deducting all the liabilities of the company in the whole of the United States from such of the assets of the company in the whole of the United States as are either (1.) deposited on fixed deposit in any State of the United States in accordance with the requirements of the law of such State as mentioned in the preceding paragraph, or (2.) are invested in any form of investment in the United States permitted by the insurance laws of the State of New York, if and so long as such investments are invested and held in the United States by trustees who are American citizens and are approved by the Superintendent of Assurance of the State of New York. In order to undertake and keep such an amount on any one risk as the company may desire the company has been compelled, under the provisions of the law above referred to, to make considerable deposits with trustees in the United States beyond the

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fixed deposits described in the preceding paragraph. The limitation imposed extends only to the total amount undertaken on any one risk, and does not restrict the number of different risks that may be undertaken.

(*b*) In Canada, that an insurance company doing fire insurance business in Canada but incorporated elsewhere than in Canada and authorized by its charter to also carry on life and other branches of insurance shall keep and maintain assets in Canada in excess of its liabilities to policy-holders in Canada at such an amount as the Treasury Board shall determine. For this purpose the assets of the company in Canada are deemed to consist of the deposits mentioned above and such assets as have been vested in trust for the company in two or more persons resident in Canada and approved by the Minister of Finance and are of a character approved by the Treasury Board. The company has accordingly been required to make considerable deposits with trustees in Canada beyond the fixed deposits mentioned above.

(N.) The funds representing the further moneys necessarily deposited in the United States and Canada in order to comply with the aforesaid laws of the State of New York and the Dominion of Canada, although they cannot in the ordinary course of business be used by the company for the purpose of meeting current losses or defraying current expenses, are intended to constitute a trust fund for the protection of the company's policy-holders in the said States and Dominion. As regards classes A and B the laws of the United States and Canada do not prevent the company changing or varying the deposited investments if they so desire, provided the substituted investments comply with the statutory requirements.

(O.) Class C of the investments have not been made by the company under or by reason of any legal obligation whatever, and are investments made in the United States, Canada, and Australia for the purpose of deriving income or profit from moneys of the company. These sums consist of accumulated profits made in the past years, but not distributed among the shareholders, which the directors have invested in high-class securities in order to have a fund easily realizable if required. Generally it has not hitherto been necessary for the company

to realize or expend any part of these moneys for the immediate purpose of carrying on their business as insurers, but they are available like any other property owned by the company for such purpose or any other purpose of the company whenever the company may think fit or necessary.

(P.) The investments referred to in all the aforesaid three classes produce annually or from time to time interest and dividends, which interest and dividends have been paid to and received by the agency or branch of the company in the State, Dominion, or country where the money from which such interest or dividends arose is invested or deposited.

(Q.) None of the sums so received by the company or its agents or branches by way of interest or dividends arising from the deposits or investments aforesaid are in fact remitted in forma specifica to the United Kingdom. The actual amounts so retained abroad and not remitted home in the years 1900, 1901, 1902, 1903, 1904, 1905, and 1906 were not ascertained by the Commissioners, it being arranged between the parties that these amounts could be ascertained and agreed on at a later date if necessary.

(R.) Although no part of the interest and dividends arising from the company's said deposits and investments abroad have been in fact remitted in forma specifica to the United Kingdom the whole amount is duly credited in the United Kingdom in the company's books and brought into all its accounts, where appropriate, including its profit and loss accounts.

(S.) As a general rule the liabilities of the company accruing in the United States and the Dominion of Canada can be met out of the profits the company has there, that is to say, the dividends or interest received from the moneys invested as hereinbefore set out in classes A, B, and C, and the premiums which are paid to it. But should extraordinary circumstances arise the company could and would meet the claims made upon it by drawing upon its investments.

3. It was contended on behalf of the company—

(*a*) That the dividends or interest arising from the said three classes A, B, and C of deposits and investments were none of them assessable to income tax under the Income Tax Acts.

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(*b*) That the said three classes of deposits and investments were standing aside from and outside of the carrying on of the business and employment therein, and that the motive why that was so was immaterial, and hence the profits therefrom formed no part of the profits of the business within case 1 of Sched. D or otherwise.

(*c*) That as the interest and dividends arising from the said three classes of deposits and investments had been retained and reinvested abroad neither the interest nor the dividends were liable to income tax.

(*d*) That the case of *Gresham Life Assurance Society* v. *Bishop* (1) applied.

(*e*) That as the interest and dividends from the said three classes of deposits and investments were not remitted to or received in the United Kingdom they are not liable to assessment to income tax, whether under case 4 or case 5 of Sched. D or otherwise.

(*f*) That they are not taxable under case 1 of Sched. D of the Income Tax Act, 1842, as profits or as part of the profits of the business mentioned in paragraph 1 hereof as being carried on by the company.

4. It was contended on behalf of the Crown—

(*a*) That the investment of the company's moneys as specified in classes A, B, and C is an essential part of its business without which it could not undertake or carry on the business of insurers.

(*b*) That the interest and dividends arising from investments necessarily made for the purpose of a business form part of the profits and gains of that business.

(*c*) That the whole of the profits and gains of the company including all such interest and dividends have been properly assessed in one sum under case 1 of Sched. D of the Income Tax Act, 1842.

(*d*) That as the assessments are under case 1 it is immaterial whether the interest and dividends were remitted to or received in the United Kingdom or not.

(*e*) That the case of *Gresham Life Assurance Society* v.

(1) [1902] A. C. 287.

Bishop (1) does not apply inasmuch as in that case the assessment was not under case 1 in respect of profits, but under case 4 in respect of securities out of the United Kingdom the interest on which was not remitted to this country.

6. Having regard to the manner in which the "liabilities" and "assets" are set out in the company's balance-sheet, and to the fact that insurers, in considering what would be the nature and extent of their security, would have regard to the total amount of the assets of the company, and having considered the facts of the case as hereinbefore stated and the provisions of the income tax law relating thereto, the Commissioners gave judgment as follows:—

We are of opinion that the contention of the Crown is correct. We find that the investments in question made by the appellant company in the foreign countries named were made in the carrying on of, and were part of, its business transactions, and we hold that the interest on such investments should be included as receipts of the company in arriving at its liability under case 1 of Sched. D. We adjourned the case for the parties to discuss figures and to submit to us the sums at which under such judgment on the foregoing point of law the several assessments for the years in question should be respectively fixed

7. At the adjourned meeting held on May 26, 1909, we reduced the assessments to the following sums:—

For the year 1903, ending April 5, 1904, to £103,359.
„ 1904 „ „ 1905 „ £187,789.
„ 1905 „ „ 1906 „ £208,423.
„ 1906 „ „ 1907 „ £243,588.

9. The question for the opinion of the Court is whether the Commissioners were right in concluding from the facts set out herein that the whole of the interest and dividends arising from the several investments under class A, class B, and class C (whether actually remitted to the United Kingdom or not) formed part of the profits of the company assessable under case 1 of Sched. D of the Income Tax Act, 1842.

Hamilton J. affirmed the decision of the Commissioners (2), and the company appealed.

(1) [1902] A. C. 287. (2) [1911] 2 K. B. 577.

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Danckwerts, K.C., and *A. M. Latter*, for the appellants. The appellant company has many investments in the United States and in Canada the income of which is never received in this country and is therefore not chargeable with income tax under s. 100, Sched. D, fourth case, of the Income Tax Act, 1842, which and case 5 are the cases which apply to this income. At one time it was said that if foreign income appeared in the accounts of a British company that was a constructive remittance of it to the United Kingdom and it became subject to the tax; but that theory has been brought to an end by *Gresham Life Assurance Society* v. *Bishop*. (1) This income does not fall within the first case of Sched. D; it does not form part of "the balance of the profits or gains of such trade, manufacture, adventure or concern in the nature of trade." The whole of that sentence is governed by the words "in the nature of trade." It is not employed in carrying on the trade of insurance; it is collateral to it: *Colquhoun* v. *Brooks* (2); *San Paulo (Brazilian) Ry. Co.* v. *Carter*. (3)

It has been said that a company cannot act as an individual and make investments apart from their trade, but the appellants are expressly authorized by their memorandum of association to invest their money. It is one of the objects of the company.

A company can carry on two trades, each having a separate capital. The word used in the Act is "trade," not "business," and what is liable to income tax is the profit on the trade: *Ashton Gas Co.* v. *Attorney-General*. (4) The appellants carry on distinct trades, namely, fire and life insurance; and by s. 101 they can set off losses in the one against gains in the other. That section applies to corporations: *Rex* v. *Special Commissioners of Income Tax* (5); s. 40 of the Act of 1842.

[*Sir John Simon, S.-G.*, referred to *Curtis* v. *Old Monkland Conservative Association*. (6)]

If these were investments of realized funds in foreign stocks they would be taxable only under the fourth case and to the extent to which the interest was received here: *Smiles* v.

(1) [1902] A. C. 287.
(2) (1889) 14 App. Cas. 493.
(3) [1896] A. C. 31.
(4) [1906] A. C. 10.
(5) (1909) 100 L. T. 585.
(6) [1906] A. C. 86.

Australasian Mortgage and Agency Co. (1) The test is whether the investment has been used for carrying on any part of the trade: *City of London Contract Corporation* v. *Styles* (2); *Strong & Co.* v. *Woodifield* (3); *Sulley* v. *Attorney-General* (4); *Nobel Dynamite Trust Co.* v. *Wyatt* (5): *Lovell & Christmas* v. *Commissioner of Taxes* (6); *Dillon* v. *Corporation of Haverfordwest.* (7) Classes A and B are investments made in fulfilment of a condition precedent; class C are simply the invested property of the shareholders. *Scottish Union and National Insurance Co.* v. *Smiles* (8), *Northern Assurance Co.* v. *Russell* (9), and *Norwich Union Fire Insurance Co.* v. *Magee* (10) are relied on by the Crown, but they turned on the doctrine of constructive remittance, which has been exploded. The appellants did in fact make permanent investments in America. The reason for these investments and the manner in which they appear in the accounts of the company are immaterial. These investments are not within case 1: *Edinburgh Life Assurance Co.* v. *Lord Advocate* (11); *Kodak, Ld.* v. *Clark* (12); *Gramophone and Typewriter, Ld.* v. *Stanley.* (13)

Sir John Simon, S.-G., and *Finlay*, for the Crown. The question is whether in the circumstances of this case the Crown is entitled to apply the first rule of case 1 of Sched. D to these dividends. It is not necessary to decide whether a trading company can hold investments which do not form part of the profits of its business. Cases 1 and 4 overlap each other and the same property may fall under both. The Crown has the right to proceed under either or both of these cases at its option. In order to get a decision on this point some questions of fact were waived at the hearing before the Commissioners in order to obtain a decision, but it is still open to the Crown, if necessary, to go into the details. These dividends are annual

(1) (1888) 15 R. 872, 878; 2 Tax Cases, 367, 378.
(2) (1887) 2 Tax Cases, 239.
(3) [1906] A. C. 448.
(4) (1860) 5 H. & N. 711.
(5) (1893) 3 Tax Cases, 224.
(6) [1908] A. C. 46.
(7) [1891] 1 Q. B. 575.
(8) (1889) 16 R. 624; 2 Tax Cases, 551.
(9) (1889) 2 Tax Cases, 571.
(10) (1896) 73 L. T. 733.
(11) [1910] A. C. 143.
(12) [1903] 1 K. B. 505.
(13) [1906] 2 K. B. 856; [1908] 2 K. B. 89.

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profits or gains of the company's trade within case 1 and are assessable to income tax, and it is not necessary to shew that they have been received in this country, as it would be if the Crown had proceeded under case 4. The whole trade of the company must be treated as one business and the dividends taken into account in ascertaining the balance of profit: *Last* v. *London Assurance Corporation.* (1) In *Smiles* v. *Australasian Mortgage and Agency Co.* (2) it is expressly laid down that such dividends as these fall within case 1: *Scottish Union and National Insurance Co.* v. *Smiles* (3); *Clerical, Medical and General Life Assurance Society* v. *Carter* (4); *Northern Assurance Co.* v. *Russell* (5); *Norwich Union Fire Insurance Co.* v. *Magee.* (6) Assessments are not made under the cases or rules, but under the schedule, and the cases and rules help us to apply the schedule. There is an implied provision that the schedule shall not be used twice. There is no question here of constructive remittance or of the application of *Gresham Life Assurance Society* v. *Bishop.* (7) The Crown may elect between the two cases: *Scottish Mortgage Co. of New Mexico* v. *McKelvie* (8); *Revell* v. *Edinburgh Life Insurance Co.* (9) There is no difference for the present purpose between the three classes of investment, A, B, and C. A company cannot act as an individual and hold property apart from its trade.

Danckwerts, K.C., in reply, referred to *New York Life Insurance Co.* v. *Styles* (10), Life Assurance Companies Act, 1870, s. 4, and Buckley on Companies, 8th ed., p. 811.

Cur. adv. vult.

Danckwerts, K.C., and *Bremner*, for the respondents in *Brice* v. *Northern Assurance Company*;

Danckwerts, K.C., and *Kerly*, for the respondents in *Brice* v. *The Ocean Accident and Guarantee Corporation*; and

Sir John Simon, S.-G., and *Finlay*, for the appellant in both

(1) (1884) 12 Q. B. D. 389, 401; 14 Q. B. D. 239; (1885) 10 App. Cas. 438, 451.
(2) 15 R. 872; 2 Tax Cases, 367.
(3) 16 R. 624; 2 Tax Cases, 551.
(4) (1889) 22 Q. B. D. 444.
(5) 2 Tax Cases, 571.
(6) 73 L. T. 733.
(7) [1902] A. C. 287.
(8) (1886) 2 Tax Cases, 165.
(9) (1906) 5 Tax Cases, 221.
(10) (1889) 14 App. Cas. 381, 391.

those cases, agreed that the decision on the first appeal would govern the others.

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Feb. 27. COZENS-HARDY M.R. These three appeals all raise the same point, and I shall therefore only refer to the first, namely, *The Liverpool and London and Globe Insurance Company* v. *Bennett*. It is true that there are some slight distinctions, but they are of no real importance.

The question is whether the appellant company can be charged under case 1 in Sched. D in respect of the income of certain American and Canadian investments, or whether they can only be charged under case 4 in respect of such moneys as are actually received in Great Britain. The general principle has been laid down in the Court of Session by Lord Dunedin in *Revell* v. *Edinburgh Life Insurance Co.* (1) The Lord President says: "The Income Tax Acts are complicated enough, but I thought it had been settled beyond all possibility of doubt that inasmuch as the Income Tax Acts do not only deal with profit in the true sense of the term as a commercial profit, but also deal with and impose taxes upon the interest of investments, the Crown has always been allowed when investments are held by a trading company, if it suits them to say 'We will charge you a tax upon the produce of your investments and we won't charge the tax upon your profits.' The Crown cannot charge the tax on both—that is to say, it cannot take a trading account which has money—its assets and investments—and first of all charge income tax upon the produce of investments, and then over and above charge on the profits. It must elect between the two. The reason is very obvious, because if the Crown were not allowed to do that, the Crown would lose the produce of an investment according to the extent whether that investment was held by a private individual or by a trading company. That being so, when you come to deal with a business like an insurance company, especially a life insurance company, which has to hold very large investments, it nearly always, in fact, in the life of an insurance company which has not a fire business, pays the Crown better to take the interest on the investments, and not to trouble with the

(1) 5 Tax Cases, 221, at p. 226.

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profits." I feel no doubt that the Crown has an option to tax under case 1 or under case 4 in any state of circumstances falling within that case.

The plaintiff company is an English company, and its whole business is controlled by its board in England, although it possesses branches abroad. The business of the company extends to life and fire insurance. For the purpose of this appeal it is only necessary to consider fire insurance. A large business in fire insurance is transacted in the United States and Canada. By the law in both those countries no business in fire insurance can be carried on by a foreign insurance company unless the company deposits certain sums to be invested in certain securities. Large investments have been made by the appellant company in pursuance of this requirement, and the case finds that these are held as a fund out of which in case of non-payment of claims by the company the policy-holders of the company in the United States and the Dominion can be paid. Meanwhile the interest or income on the investments is paid to and received by the company. These investments are called class A. Class B investments stand very much in the same position. They are required as a further security in the event of the company desiring to undertake and retain fire insurance risks beyond a certain amount. These further investments are found by the case to be intended to constitute a trust fund for the protection of the moneys of the policy-holders in the States and the Dominion. Class C are investments which have not been made by reason of any legal obligation, but are investments made for the purpose of deriving income or profit from moneys of the company and in order to have a fund easily realizable if required. The interest and dividends of the investments in classes A, B, and C have been retained by the company in the United States and the Dominion, and no part has been actually received in this country. They have not been taxed at the source. In these circumstances it is contended by the Crown and has been decided by Hamilton J. that the interest or dividends form part of the amount of the balance of the profits or gains of the trade, adventure, or concern of the company within case 1. In my opinion this decision was perfectly right. It seems to me, with

respect to A and B, those investments are required for the purposes of the business of the company, and that the income thereof must be brought into the profit and loss account. The business could not be conducted at all without such investments being made. With respect to class C the case is scarcely less strong. The investments are made in order to secure the credit of the company and to enable it to discharge its obligations in the United States and the Dominion.

I have thus far treated the case apart from authority. So far as I am aware there is no authority against this view and there are several authorities in favour of it. The case of *Gresham Life Assurance Society* v. *Bishop* (1) in the House of Lords has no real bearing. It only decided that the Crown, in a case like this, could not charge under case 4 on the footing that the dividends had been constructively received in England by reason of having been brought into the published profit and loss accounts. The doctrine of constructive receipt was negatived, but there is not a word to suggest that the Crown might not have claimed under case 1. In *Scottish Mortgage Co. of New Mexico* v. *McKelvie* (2) the Lord President expresses the clear opinion in a case similar in many respects to this, where it was claimed under case 4, that he had no doubt that the duty might have been charged under the first case in Sched. D; and in the case of *Northern Assurance Co.* v. *Russell* (3), dealing with the case of an insurance company, the Lord President laid down "that the interest of investments which has not suffered deduction of income tax at its source must be taken into account in ascertaining the assessable amount of profits and gains of the company." In *Norwich Union Fire Insurance Co.* v. *Magee* (4), it was held by Wright J. that, "If there is a trade which cannot be carried on without making investments abroad, the interest arising on the investments necessarily made for the purpose of the trade is, as it seems to me, part of the gains of that trade." In my opinion the decisions to which I have referred correctly state the law.

It was argued that by clause 18 of the memorandum of

(1) [1902] A. C. 287.
(2) 2 Tax Cases, 165, at p. 172.
(3) 2 Tax Cases, 571, 577
(4) 73 L. T. 733; 3 Tax Cases, 457.

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association of the company one of its objects is to invest the moneys not immediately wanted in such manner as may from time to time be required, and that this was an object quite distinct from carrying on any trade or business. In my opinion that was not proper subject-matter for insertion in the memorandum. It would have been implied if not expressly mentioned. It is not really a distinct object. The business of the company in all its branches is, in truth, one. In this respect a limited company in no way resembles a private individual who may have in addition to his business and the capital employed therein a private fortune which he may spend or invest in any way he thinks fit. The result is that in my opinion these appeals fail and must be dismissed with costs.

FLETCHER MOULTON L.J. It is admitted by all parties that these cases must follow the decision in *The Liverpool and London and Globe Insurance Company* v. *Bennett*, and I shall therefore in my judgment deal only with that case. It is unnecessary for me to recapitulate the facts. They are clearly set out in the special case and in the judgment of the Master of the Rolls, and I shall at once proceed to deal with the legal contentions raised on behalf of the appellants.

In the first place it is contended that the dividends or interest arising from the classes of deposits and investments known as A, B, and C ought not to be taken into consideration in ascertaining the balance of the profits or gains of the appellant company. In support of this contention numerous points were raised, such as that the company held these deposits or investments in some other capacity than as a trading company, and that they were therefore to be treated in a like manner to private investments belonging to a person engaged in some trade wholly unconnected therewith, the interest or dividends on which would form part of his total income, but not of the profits of his trade. Indeed it was at one time suggested that the company by virtue of the ample powers given by its memorandum of association could not only carry on more than one business, but that it could in exercise of special powers so given to it purchase and hold investments, and that in respect of the holding of such

investments the company was not carrying on any concern in the nature of trade and was therefore outside the first case of r. 1 of Sched. D. I cannot agree with these contentions. Without deciding that a company cannot in any case carry on more than one business (or in other words that the totality of the business operations which it carries on must in all cases be considered as the one business of the company) I am of opinion that the facts of the present case give no support whatever to the contention. The company no doubt carries on an insurance business of a very wide and comprehensive character, but it does nothing more. The formation of reserve funds out of the accumulations of premiums or otherwise so as to meet the demands made upon it under its policies is an essential part of the business of such a company, and the dividends and interest from such investments form an integral part of its business receipts. For this reason I decline to treat separately the three classes A, B, and C into which these deposits and investments are divided in the case. They appear to me to be all equally investments made for the purposes of the business and in the ordinary course of carrying it on, and the returns therefrom must equally be brought into account. And inasmuch as the point was raised in argument and should not be left undecided I hold that as a matter of interpretation the words "in the nature of trade" that appear in the section qualify only the word "concern" that immediately precedes them. They cannot be taken to qualify all the preceding words, inasmuch as it would be absurd to speak of a "trade in the nature of trade," and therefore they can only be construed as qualifying the last of these words. The word "adventure" therefore stands unqualified, and I hold that the whole business of this company comes rightly within it, and that the interest and dividends from these deposits and investments must be brought into account in ascertaining the balance of its gains and profits.

It follows from the above that the company is liable to be assessed in the manner appealed against unless there is something in the remainder of the Act which limits the application of case 1, Sched. D. This the appellants claim to find in case 4 of Sched. D. They say that these deposits and investments come

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within the term "foreign securities" which is there to be found, and that therefore they are liable only to the duties therein prescribed, that is to say, that duty is to be paid only upon such part of the dividends and interest as is brought over to this country. It may well be that these deposits and investments come within the category of securities to be found described in case 4 and that the Crown could claim the duties thereby imposed in respect thereof. But this will not suffice to support the contention of the appellants. They must shew that the Crown is compelled to charge them under case 4 and not otherwise. If they could do so it would establish their case, because these receipts having been taxed under case 4 could not be brought into account in calculating the profits to be taxed under case 1, as that would be to tax them twice over. It is here that the contention of the appellants breaks down. In my opinion the Crown is not compellable to take this course. It may tax the whole gains and profits under case 1 if it pleases so to do, but in that case it cannot charge under the specific provisions of case 4 the dividends and interest which furnish a component part of these profits.

In my opinion the true position of the five cases under Sched. D is as follows: They impose separate and independent liabilities to pay income tax, and so far as the circumstances of any individual bring him within the ambit of any one of them he is liable to pay the income tax imposed thereby. But they are not cumulative. This has been held by every Court and is evident from the nature and structure of the Act itself. The Crown may therefore enforce any one or more of these liabilities, but if it enforces more than one it must do so only to such an extent that there is no double charging in respect of any item of income or receipt. In the present case the Crown proposes to enforce the liability under which the company lies by reason of the taxation imposed by r. 1. In calculating the balance of gains and profits on which the charge is to be made the Crown must take into account the whole of these dividends and interest, and having done so and levied the tax on the balance so obtained, it is precluded from charging such dividends or interest or any part thereof under case 4. This it does not seek to do.

That the liabilities under the five cases of Sched. D are independent appears to me to flow directly from the language of the Act. None of the cases are limited by words which refer to the ambit of any of the other cases, and though it is clear that certain of them apply only to cases which cannot come within the ambit of certain others, there is no general provision against the cases overlapping, and undoubtedly they must do so. This being so, it is clear that whenever there is such an overlap it must be open to the Crown to choose under which case it will assess the tax. The only restriction that can bind its hand is that it must not proceed under more than one in such a way as to make the liability cumulative. This amounts to saying that where a receipt comes under more than one case the Crown has the option under which case it will assess the tax subject to the restriction that it must not tax it twice over.

Upon this short ground, therefore, I am of opinion that the fact that the Crown might have assessed the tax on these dividends and interest under case 4 does not in any way prevent its assessing the company on the whole of its gains and profits under case 1. In doing so the whole of these dividends and interest must be brought into account, and this will prevent any assessment of the company in respect of them under case 4. It follows, therefore, that this appeal must be dismissed with costs.

BUCKLEY L.J. The business of the Liverpool and London and Globe Insurance Company includes fire, life, and annuity business, but in the United States of America, and in Canada, they confine themselves almost entirely to fire insurance business. Their fire insurance business is carried on also in this country. That class of business, therefore, is carried on not wholly without the United Kingdom, but partly within and partly without it. The head office of the company is at Liverpool. The case is, therefore, one in which, according to the decisions in *Colquhoun* v. *Brooks* (1) and *San Paulo (Brazilian) Ry. Co.* v. *Carter* (2), the corporation, if assessed under the first case of Sched. D, is assessable upon the full amount of the balance of the profits of the trade, and not only upon the actual sums received in the United Kingdom.

(1) 14 App. Cas. 493. (2) [1896] A. C. 31.

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Further, so far as that is material, the business of the company in respect of fire insurance is not to be segregated from that in respect of life and annuity business. For the purposes of income tax the three businesses are one business, and the profits of that business are to be taken as a whole: *Last* v. *London Assurance Co.* (1) (which upon this point was not disturbed on appeal); *Smiles* v. *Australasian Mortgage and Agency Co.* (2); *Northern Assurance Co.* v. *Russell.* (3)

The question upon this appeal is whether the interest and dividends arising from investments under classes A, B, and C, presently stated, although not actually remitted to the United Kingdom, form part of the profits of the company assessable under the first case of Sched. D. The three classes are as follows: Class A are investments made in the United States of America and Canada as deposits required by law as a condition of carrying on business there. So long as the company there carries on business they are by law unable to recover possession of the deposits, but the sums are held as a fund out of which in case of non-payment of claims by the company the policy-holders there can be paid (case, paragraph L). Class B are similar deposits not required as a condition of carrying on business, but required as a condition if the company carries on business by accepting risks beyond a certain limit. Class B cannot in the ordinary course of business be used by the company for the purpose of meeting current losses or defraying current expenses, but constitute a trust fund for the protection of the policy-holders there (case, paragraph N). Class C are investments voluntarily made in the United States, Canada, and Australia. They consist of accumulated profits not distributed which the directors have invested in order to have a fund easily realizable if required. They are available like any other property owned by the company for the purpose of carrying on the business, or any other purpose, of the company whenever the company think fit or necessary (case, paragraph O). None of the sums received by way of interest or dividend on any of these three classes are in fact remitted to the United Kingdom (case, paragraph Q), but paragraph S of the case states as regards all the

(1) 12 Q. B. D. 389; 14 Q. B. D. 239; 10 App. Cas. 438.

(2) 15 R. 872; 2 Tax Cases, 367.

(3) 2 Tax Cases, 571, 577.

classes of investments as follows: "(S.) As a general rule the liabilities of the company accruing in the United States of America and the Dominion of Canada can be met out of the profits the company has there, that is to say, the dividends or interest received from the moneys invested as hereinbefore set out in classes A, B, and C, and the premiums which are paid to it. But should extraordinary circumstances arise the company could and would meet the claims made upon it by drawing upon its investments." The dividends, therefore, are presently available—and the corpus is available if circumstances so require—to meet the company's liabilities.

Under Sched. D the corporation may be assessed either under case 1 upon its profits, or under cases 4 and 5, or one of them, upon the sums arising from its investments, so far as they have been received in Great Britain. It is for the Crown to say under which case it seeks to assess the corporation: *Scottish Mortgage Co. of New Mexico* v. *McKelvie* (1); *Revell* v. *Edinburgh Life Insurance Co.* (2) The subject is liable both under the one and under the other, but so, of course, that the duty is not paid twice over. See also the first sentence of Lord Halsbury in *Gresham Life Assurance Society* v. *Bishop.* (3)

In most cases the Crown, not seeking to involve itself in an inquiry as to the balance of profits and losses of the business, has proceeded under the fourth case to assess upon the interest and dividends received in this country. For in respect of these the duty is payable whether the business has been carried on at a loss or not. But where the Crown proceeds under the first case it is immaterial whether the interest or dividends have been received here or not. The only question is whether they are profits of the business. Even where the Crown proceeds under the first case it is not all fruit produced by property of the company which is profits for this purpose. In *Kodak, Ld.* v. *Clark* (4) and in *Gramophone and Typewriter, Ld.* v. *Stanley* (5) the profits in question were fruit of property of the company, but were not assessable under the first case because the claim was made not upon the balance

(1) 2 Tax Cases, 165, 176.
(2) 5 Tax Cases, 221, 226.
(3) [1902] A. C. 287, 291.
(4) [1903] 1 K. B. 505.
(5) [1906] 2 K. B. 856; [1908] 2 K. B. 89.

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of profits and losses, but for these profits as being profits earned by the English corporation, which it was held they were not. They were profits assessable under the fourth or fifth case, but only if received in this country. On the other hand, where the assessment is under case 1 for a balance of profits and losses, interest upon advances made in the trade is chargeable under the first case: *Smiles* v. *Australasian Mortgage and Agency Co.* (1)

The question here, in my opinion, is not whether these dividends have been brought into account in the balance-sheet, for that is not equivalent to a receipt in the United Kingdom if the Crown is proceeding under the fourth case—*Gresham Life Assurance Society* v. *Bishop* (2)—but whether the interest and dividends are profits of the business as fruit derived from a fund employed and risked in the business. The decision in *Gresham Life Assurance Society* v. *Bishop* (2) does not govern this case for the simple reason that the Crown there was proceeding under the fourth case, and not under the first case. This case is similar, not to *Gresham Life Assurance Society* v. *Bishop* (2), but to *Norwich Union Fire Insurance Co.* v. *Magee* (3), a decision which I think was right. The same proposition as in the last-mentioned case is to be found in *Northern Assurance Co.* v. *Russell.* (4) I arrive at the conclusion that this appeal fails upon the strength of the statements in the case which I cited at length at the commencement of this judgment. From these I learn what these funds are as regards their origin, what are the circumstances under which the investments were made, and what are the purposes to which the income presently, and the corpus under circumstances, are applicable. As regards classes A and B the investments were made for the purposes of the trade, and as a condition precedent to doing business at all, or doing business beyond a certain limit. As regards C, they were made voluntarily. But one and all of them are as regards both principal and income available either generally or under circumstances to meet the liabilities of the trading company in the course of its business. Under these circumstances their income is, I think, a sum which, whether remitted to this

(1) 15 R. 872; 2 Tax Cases, 367.
(2) [1902] A. C. 287.
(3) 73 L. T. 733; 3 Tax Cases, 457.
(4) 2 Tax Cases, 571, 577.

country or not, is, upon a statement of profits and losses in order to arrive at an assessable balance of profit, a sum to be taken into account. For these reasons I think that this appeal fails and should be dismissed with costs.

The other two cases follow the decision in this case.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co., for Laces & Co., Liverpool; Mellor & Co.; Lyne & Holman; Solicitor of Inland Revenue.*

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HILL, APPELLANT *v.* GREGORY (SURVEYOR OF TAXES), RESPONDENT.

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Revenue—Income Tax—Lease of Minerals—No Entry by Lessee—Payment of Minimum Rent under the Lease—Assessment of Lessor—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35,), *s.* 60, *Sched. A, No. II., r.* 6.

The appellant granted to a company a lease for a term of years of all the coal and other minerals under land of which he was the owner at a "footage rent or royalty" to be computed yearly and at a "minimum yearly rent" of 60*l.* The company also owned the minerals under adjoining lands, which it intended to work together with the demised minerals as one colliery undertaking. The company had bored for coal under the adjoining lands, but no borings or workings had taken place with regard to the demised coal; and the company had not yet produced any coal or minerals.

The company paid the minimum yearly rent of 60*l.* to the lessor, deducting income tax; but it did not pay over the amount of the tax to the Crown. No assessment had been made in respect of the demised coal. The lessor, having been assessed to income tax under Sched. A in respect of the sum of 60*l.*, appealed against the assessment:—

Held, that the company was not in occupation of the demised coal and was not entitled to deduct the tax from the payment made to the lessor; and that the lessor was properly assessed in respect of the minimum yearly rent paid to him as "profits arising from lands tenements and hereditaments not in the actual possession or occupation of the party to be charged," within s. 60, Sched. A, No. II., r. 6, of the Income Tax Act, 1842.

CASE stated by Income Tax Commissioners.

Hill appealed against an assessment upon him, for each of the

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years ended April 5, 1908 and 1909, in the sum of 60*l.*, under s. 60, Sched. A, No. II., r. 6, of the Income Tax Act, 1842. (1)

By a lease of June 11, 1907, Hill, in exercise of the powers given to him by the Settled Land Act, 1882, as tenant for life, demised to the Warwickshire Coal Company the mines and seams of coal and other minerals under 145 acres of land for the term of ninety-nine years from March 25, 1907. The lease reserved "rents and royalties" as follows: in respect of the coal a "footage rent or royalty" to be computed yearly in a certain manner; in respect of the other minerals a "tonnage rent or royalty" to be computed yearly as therein provided; and, in case the lessees should not in any year of the first four years of the term get such quantity of coal or minerals as would produce the clear yearly minimum rent of 60*l.*, or of 80*l.* during the rest of the term, then "such a sum as together with the footage and tonnage rents and royalties . . . . would amount to the minimum rent aforesaid." The lease contained a proviso for re-entry if any part of the "rents and royalties" reserved should be in arrear for thirty days; and liberty to enter upon the surface to sink shafts and do other acts for the purpose of working the demised coal and minerals was granted to the lessees.

(1) 5 & 6 Vict. c. 35, s. 60: "The duties hereby granted and contained in the said schedule marked (A) shall be assessed and charged under the following rules . . . .

"No. I. General Rule for estimating lands, tenements, hereditaments or heritages mentioned in Schedule (A). The annual value of lands tenements hereditaments or heritages charged under Schedule (A) shall be understood to be the rent by the year at which the same are let at rack rent . . . .; which rule shall be construed to extend to all lands tenements and hereditaments or heritages capable of actual occupation, of whatever nature, and for whatever purpose occupied or enjoyed, and of whatever value, except the properties mentioned in No. II. and No. III. of this schedule.

"No. II. Rules for estimating the lands tenements hereditaments or heritages herein mentioned which are not to be charged according to the preceding general rule.

"The annual value of all the properties hereinafter described shall be understood to be the full amount for one year, or the average amount for one year, of the profits received therefrom . . . .:

"Sixth. Of all other profits arising from lands tenements hereditaments or heritages not in the actual possession or occupation of the party to be charged, and not before enumerated . . . . to be charged on the receivers of such profits or the persons entitled thereto."

The surface was let by Hill to a farming tenant, who was assessed under Sched. A as occupier of his farm in respect of the annual value thereof. No assessment was made in respect of the mines or mineral seams under the land and comprised in the lease; and the company had not been assessed in respect of any mines or minerals.

No mineral workings or borings had taken place under or upon the 145 acres, but the mineral field of which those minerals formed part had been bored by the company. The mining operations had not yet reached the stage of production of minerals.

For each of the years ending March 25, 1908 and 1909, the company paid Hill the minimum rent of 60*l.*, and upon payment deducted income tax at the rate in force. The tax so deducted was not paid over to the Crown by the company.

The company had obtained leases of the mines and minerals under adjoining lands from other owners, and also owned about 1000 acres of adjoining land together with the mines and minerals thereunder. All these lands and minerals were acquired by the company for the purpose of forming and working one large colliery undertaking.

Hill contended that there was a double charge or assessment within s. 171 of the Income Tax Act, 1842; that the rents were not assessable under s. 60, Sched. A, No. II., r. 6, of that Act; that the company was entitled and bound to deduct income tax from the rent, under s. 102, Sched. A, No. IV., r. 10, of the Act of 1842 and s. 40 of the Income Tax Act, 1853; and that the company (if any one) was assessable. The respondent contended that these rents were profits within s. 2 of the Act of 1853, and within s. 60, Sched. A, No. II., r. 6, of the Act of 1842, and were correctly assessed on Hill; and that the company was not entitled to deduct income tax from the rents.

The Commissioners confirmed the assessment upon Hill.

Danckwerts, K.C., and *Daldy*, for the appellant. This sum of 60*l.* is either an annuity, yearly interest of money, or other annual payment, payable either as a charge upon the land of the company or as a reservation thereout, or as a personal obligation

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by virtue of the covenant contained in the lease, within s. 102 of the Income Tax Act, 1842, and is payable out of the profits and gains of the company, and the duty, therefore, is payable by the company under Sched. D, or it is an annuity not payable out of profits and gains, within s. 24, sub-s. 3, of the Customs and Inland Revenue Act, 1888 (1); and in either case the company is entitled to deduct the amount of the tax. This annual sum must come within one or other of those sections if it does not come under any of the provisions of Sched. A. Therefore the company were entitled and bound to deduct the duty from the payments made, and the deduction was made as collecting agent for the Crown, so that the appellant cannot be called upon to pay over again: *Glamorgan Quarter Sessions* v. *Wilson* (2); *London County Council* v. *Attorney-General.* (3) The payee cannot be assessed if the duty is deducted at the source by a person who is entitled and bound to deduct; and when the duty is so deducted the Crown is paid so far as the payee is concerned and he cannot be assessed, for the Crown is not entitled to receive the tax twice over: *Foley* v. *Fletcher* (4); *Gilbertson* v. *Fergusson* (5); *Attorney-General* v. *Ashton Gas Co.* (6); *Leeds Benefit Building Society* v. *Mallandaine* (7); *Surbiton Urban District Council* v. *Callender's Co.* (8) This is clearly an "annuity or other annual payment": *Taylor* v. *Evans* (9); *Edmonds* v. *Eastwood.* (10)

The company is in possession of the demised hereditaments and holds them as part of its whole coalfield, of which it is undoubtedly in occupation and which it has commenced to work. The company, therefore, and not the appellant, ought to be assessed under the rules of case IX. of s. 63 of the Act of 1842.

Sir Rufus Isaacs, *A.-G.*, and *W. Finlay*, for the respondent. This sum of 60*l.* is rent, and not an "annuity or other annual payment" as in *Taylor* v. *Evans* (9), and therefore it does not come within the provisions upon which the appellant relies. This sum of money does not come under Sched. D in any way, and

(1) 51 & 52 Vict. c. 8.
(2) [1910] 1 K. B. 725.
(3) [1901] A. C. 26, 38.
(4) (1858) 3 H. & N. 769, 783.
(5) (1881) 7 Q. B. D. 562, 570.
(6) [1904] 2 Ch. 621.
(7) [1897] 2 Q. B. 402.
(8) (1910) 8 L. G. R. 244.
(9) (1856) 1 H. & N. 101.
(10) (1858) 2 H. & N. 811.

it is not within s. 102 of the Act of 1842 because it is rent; it is reserved as rent and is payable in respect of land: *Daniel* v. *Gracie* (1); *Edmonds* v. *Eastwood*. (2) If the company was entitled to deduct the duty, it rightly deducted it, and the appellant is not liable; but the company had no right to deduct the tax. The company could not be assessed; it was not in occupation of the demised hereditaments. Therefore the appellant was properly assessed under s. 60 of the Act of 1842, Sched. A, case II., r. 6, under the words "all other profits arising from lands, &c., not in the actual possession or occupation of the party to be charged."

Danckwerts, K.C., in reply. If this payment is within Sched. A at all, there was a demise of minerals and the lessees were the occupiers and chargeable under s. 60, Sched. A, No. I., and were entitled to deduct the amount of duty: *Davis* v. *Shepherd* (3); *Taylor* v. *Parry* (4); *Ystradyfodwg and Pontypridd Main Sewerage Board* v. *Bensted*. (5) If it is not within Sched. A, it clearly comes within s. 102 of the Act of 1842.

HAMILTON J. The appellant has demised the minerals under an area of land to the Warwickshire Coal Company, for the purpose of a colliery which it is proposing to work. The surface is not let to the company, but to an ordinary tenant who is in occupation. There are other areas in the same coalfield which the company has purchased, and in due course it proposes to work all the coal as one enterprise, though by what stages I do not know. Up to the present, however, as the case finds, the company has produced no minerals at all, and although it has tried the coalfield by making boreholes somewhere or other, it has made no boreholes and carried out no mineral workings under or upon the land included in this lease. That state of affairs was contemplated by the terms of the lease, and it is provided that "in case the lessees shall not in any year of the first four years of the said term get such a quantity of coal, ironstone, iron ore and fireclay as according to the said footage

(1) (1844) 6 Q. B. 145.
(2) 2 H. & N. 811.
(3) (1866) L. R. 1 Ch. 410.
(4) (1840) 1 Scott, N. R. 576.
(5) [1907] A. C. 264.

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and tonnage rents and royalties hereinbefore reserved will produce the clear yearly minimum rent of 60*l.*, or in case the same during the remainder of the term shall not produce the clear yearly minimum rent of 80*l.*, then and in such case yielding and paying such a sum as together with the said footage and tonnage rents and royalties for the coal, &c., actually gotten during the preceding year will amount to the minimum rent aforesaid in the same manner as if a quantity of coal, &c., sufficient at the footage and tonnage rents and royalties aforesaid to produce the said minimum rent in such year had been gotten." In other respects the lease is of a sufficiently ordinary character. The lessor, "in consideration of the rents and royalties hereinafter reserved and of the covenants by the lessees hereinafter contained," "demises and grants unto the lessees all the mines and minerals or seams of coal lying within and under all those lands messuages and hereditaments" which are then described, to hold for the term of ninety-nine years from March 25, 1907, at a "footage" rent for coal calculated in a particular way, and in respect of ironstone, iron ore, and fireclay a tonnage rent or royalty. There follows an express provision that, failing payment of the rents or royalties, the lessor may enter, seize, and distrain in order to pay the arrears.

An assessment has been made upon the appellant Hill in respect of this minimum yearly rent of 60*l.*, and before the Commissioners he challenged it in this way. He said: When the 60*l.* was paid to me the company made a deduction of the amount of income tax assessable upon that sum; therefore, not only have I never had so much of my 60*l.*, but I have in fact paid it to a person who deducted it really as an agent of the Crown. Further, the company was entitled upon the facts to retain that sum and it was not separately payable to the Crown, because under the provisions of s. 24, sub-s. 3, of the Customs and Inland Revenue Act, 1888, the company could rightly say, "We have been charged under Sched. D upon a larger sum which we received, and we have applied part of the larger sum in payment of Hill's 60*l.*, and, therefore, we cannot be made to pay duty twice over; we can deduct against him, and thus his liability is discharged; we can retain it as against the Crown because we have already discharged all our liabilities."

It was not proved, and the Commissioners were not satisfied, that any facts existed which would entitle the company to take up that attitude. It is, however, found in the case that the tax deducted by the company has never in fact been paid over to the Crown. The case put to me on behalf of the appellant is this : Whatever may be the position between the Crown and the company, the Crown cannot charge Hill, because the company was entitled, and indeed bound, to make the deduction as against him, and what it has rightly done he cannot by any means undo ; therefore he has by deduction already paid this duty and cannot be chargeable a second time. The pivot, therefore, upon which that argument turns is that the company was entitled and bound to deduct, and that Hill had no answer to its claim so to do. It is conceded that the circumstances of the case would not enable that argument to be based on s. 40 or s. 60 of the Income Tax Act of 1842 ; but it is said that it can be based either upon s. 102 of the Act of 1842, or upon s. 24, sub-s. 3, of the Act of 1888. The argument is this : The sum in question is an "annuity or other annual payment" ; it is a sum which is either a "reservation" out of property of the person paying the same by virtue of the deed or else is payable as a "personal debt or obligation" by virtue of a covenant in the deed. In that case there is an express provision in s. 102 authorizing the deduction of the duty. Alternatively, it is said that this is a payment within the words of s. 24, sub-s. 3, of the Act of 1888, which also authorizes and directs the deduction of duty. It is not disputed that, if s. 24, sub-s. 3, applies and the company was bound to deduct in pursuance of its provisions, the Crown could not claim a second time, nor could it claim in the alternative upon the appellant, who would be bound to suffer the deduction and could not defend himself against it.

I think the argument based upon those two sections involves, first of all, the consideration whether or not this sum of 60*l.* is one which can be brought within the words "annuities or other annual payments" or "annuities charged with income tax under Schedule D." It was said that one very effective way of shewing that it must come within Sched. D is to shew that the only other possibly applicable schedule, Sched. A, contains no

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rule or case under which it would fall. On the other hand it is argued for the Crown that, if it is shewn to fall within some one or other of the cases or rules of Sched. A, then it is not within Sched. D at all; and reliance was placed upon the words at the end of the definition of the schedule under the Act of 1853 (1), s. 2: "For and in respect of all interest of money annuities and other annual profits and gains not charged by virtue of any of the other schedules contained in this Act"; and upon the words in Sched. D, s. 100, of the Act of 1842: "The said last mentioned duties shall extend to every description of property or profits which shall not be contained in either of the said Schedules A, B, or C, and to every description of employment of profit not contained in Schedule E and not specially exempted from the said respective duties."

It becomes necessary, therefore, to consider whether the particular assessment would be within Sched. A, and whether the Crown's right to charge it under that schedule can be established. Now, without refusing to bring the matter under the general rule of case No. I. of Sched. A, the Attorney-General preferred to include it under r. 6 of case No. II. of the schedule: "all other profits arising from lands, tenements, hereditaments, or heritages not in the actual possession or occupation of the party to be charged and not before enumerated." "Other profits," of course, refers to the previous five rules, which include tithes, dues, and money payments in right of the Church or by endowment, compounded tithes, manors and other royalties, including dues and other services, or casual profits (not being rents or other annual payments reserved or charged) and fines received in consideration of any demise. It is said that those general words, the object of which is to bring within the ambit of case No. II. everything that may be differentiated from rent in the ordinary sense of the term, and yet is a profit arising from land, varying in amount according to changing circumstances and at the same time arising from the land and not from some business carried on upon the land, are exactly appropriate to include this particular case. It is said, further, that the hereditaments in question, the subjacent minerals, are not in the actual possession

(1) 16 & 17 Vict. c. 34.

or occupation of the party to be charged, that is to say, the appellant, because they have not been won or gotten or even reached by anybody; but that he is the owner of these minerals, and having only let the surface to an agricultural tenant and placed him in possession of it, and is himself in possession of the minerals for all legal purposes although not in actual possession.

The appellant says, on the contrary, that he is not in possession at all, and that possession, at least constructive possession, of the minerals is in the company; therefore the appellant cannot be brought within r. 6 of case No. II., whatever might be the case with regard to the company. Further, it is said that, if the case be placed under the first general rule in case No. I., which is to be "construed to extend to all lands, tenements, and hereditaments, or heritages, capable of actual occupation, of whatever nature, and for whatever purpose occupied or enjoyed, and of whatever value, except the properties mentioned in No. II. and No. III. of this schedule," then again, because the company is in possession, it and not the appellant should have been charged under s. 63, case IX., rr. 2 and 3. In my opinion the facts as found by the Commissioners prevent me from saying that, in the ordinary sense of the word, the company is the occupier of these minerals at all. There is not only no finding that it has ever entered upon the subject-matter of this demise, but I can only read the finding as negativing that view.

Then it is said that though the company has never entered it may be within the definition of occupier for the purposes of this Act, for although it has never entered upon the minerals demised by the appellant, it has in contemplation of law entered upon them by entering on minerals subjacent under other land which it owns. Rule 2 of case IX. of s. 63 of the Act of 1842 is: "Every person having the use of any lands or tenements shall be taken and considered, for the purposes of this Act, as the occupier of such lands or tenements." I do not think those words mean that every person, who is entitled by a demise to have the use when he chooses to enter and take that use, is to be deemed to be the occupier. The authority to which Mr. Danckwerts referred, *Ystradyfodwg and Pontypridd Main Sewerage Board* v. *Bensted* (1),

(1) [1907] A. C. 264.

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rather negatives than supports that argument, and I think that the person in whom these minerals were vested, and who up to the time in question has continued to have them vested in him, was the occupier in contemplation even of that decision.

I cannot appreciate how the intention of the company to work this coalfield—I do not know whether it is a whole geological field or not—as a larger enterprise can affect the liability of the appellant. I do not see how the fact that the company has bored holes in a portion of that coalfield which is its own property can constitute an entry upon the portion demised by the appellant; and none the more although, when the company comes to work the coal, it will be assessed in respect of the whole of its workings, or, when it is merely in occupation, it may be assessed in respect of the whole of its occupation. I do not appreciate how that affects the question in respect of the area upon which it has not entered at all and upon which it is only entitled to enter under the lease when the time comes for it to do so.

It seems to me to be sufficient to say that the company is not in my view, brought within r. 2 of case IX. of s. 63, and is not in fact, as found by the case, brought within r. 1 of that case, and accordingly, as the argument against this case falling within Sched. A fails, I think that it really falls within r. 6 of case II. of s. 60 and that the appellant was chargeable under that rule. If that is so, how is his liability ousted in any way? The very terms which define the subject-matter of Sched. D exclude from it the subject-matters which fall within Sched. A, and, further, the words in s. 102 of the Act of 1842 and s. 24, sub-s. 3, of the Act of 1888, which are relied upon as bringing about such an ouster, only apply where the subject-matter, however described, is something chargeable under Sched. D. To my mind this rent, or this sum payable as rent or as a supplementary rent after the working has begun, and payable as a profit arising from the land until there is an entry, is emphatically rent or in the nature of rent or profit arising from land, and is not anything that can be described as an annuity or other annual payment. It is a payment, and it is made annually, but it is not an annual payment comparable to an annuity or yearly interest on money, nor is it made so by the words which follow in s. 102: "payable

either as a charge on any property or as a reservation thereout or as a personal debt or obligation by virtue of any contract." It is not an annual payment ejusdem generis with annuities and yearly interest on money. Consequently I think that neither of the two sections that are relied upon is adequate to exclude the primary liability to assessment under Sched. A, which falls upon the appellant. That being so, I think that the deduction which was made by the company was a deduction which Hill could have questioned or resisted, and that it was not such a deduction made by a collecting agent on behalf of the Crown as to prevent the Crown from assessing the subject directly under the schedule appropriate to his case. I therefore think that the appeal fails.

Appeal dismissed.

Solicitors for appellant: *Clinton & Co., for C. Martin, Coventry.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

J. H. W.

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March 8, 11.

[IN THE COURT OF APPEAL.]

LONDON GENERAL OMNIBUS COMPANY, LIMITED *v.* HOLLOWAY.

Principal and Surety—Surety for Fidelity of Servant—Action against Surety —Avoidance of Contract of Suretyship—Non-disclosure to Surety of previous Dishonesty of Servant—Implied Representation as to Honesty of Servant—Undue Concealment of Fact—Fraud not necessary to Defence grounded on such Concealment.

Where the employer of a servant, when taking a bond from another, which purported to make him responsible as surety for the fidelity of the servant, did not disclose to the surety the fact, known to the employer, but not known to the surety, that the servant had previously been guilty of dishonesty in his employment, the employer cannot enforce the bond against the surety in respect of subsequent dishonesty of the servant, although the non-disclosure by the employer of the previous dishonesty of the servant was not fraudulent:—

So *held*, by the Court of Appeal, affirming the judgment of Lord Alverstone C.J.

Distinction between suretyship for the fidelity of a servant and a guarantee in respect of a banking account discussed.

Appeal from the judgment of Lord Alverstone C.J. in an action tried by him without a jury, as after mentioned.

The action was upon a bond given by the defendant to the plaintiffs, which purported to make the defendant responsible as a surety for the honest and faithful discharge by one Lee, a clerk in the plaintiffs' service, of his duties as such clerk.

In or about 1903 Lee entered into the service of the plaintiffs as a clerk. The plaintiffs' practice in the case of employees who had to receive money for them, as Lee had, was to require a bond by the employee and a surety to secure the fidelity of the employee. In the case of Lee by some accident no such bond was required upon his entering the plaintiffs' service. In 1905 it was discovered by the plaintiffs that Lee had misappropriated money received by him on the plaintiffs' behalf to the extent of 29*l*. The sum so misappropriated was made good by some relatives of Lee other than the defendant. As a condition of retaining Lee in their service, the plaintiffs subsequently

required a bond by himself and a surety to secure the honest and faithful discharge by him of his duties, and they gave him a form of bond for execution by himself and his surety. Lee accordingly procured the signature by the defendant, who was a relative of his, of the bond sued upon, by which, after reciting, inter alia, that, at the request of the plaintiffs and Lee, the defendant had agreed to concur in the bond by way of security for the honest and faithful discharge by Lee of his duties, Lee and the defendant became bound jointly and severally to the plaintiffs to the amount of 200*l.* by way of security as aforesaid. This bond was given in 1905. The plaintiffs did not, before the bond was given, inform the defendant of Lee's previous defalcations, and the defendant did not, when he signed the bond, know of the same. In 1909 it was discovered that Lee had subsequently misappropriated money received by him on behalf of the company to the extent of at least 100*l.*, and the plaintiffs thereupon brought their action upon the bond against the defendant in respect of the amount so misappropriated. The case came on for trial before the Lord Chief Justice and a jury, but, after the facts had been proved as above mentioned, it was agreed that the jury should be discharged without giving a verdict and the Lord Chief Justice should deal with the case on further consideration. The Lord Chief Justice on further consideration found that the non-disclosure by the plaintiffs to the defendant of the defalcations of Lee before the defendant entered into the bond was not fraudulent, but held that, upon the authorities, without fraud on the plaintiffs' part, the non-disclosure of Lee's previous dishonesty by the plaintiffs constituted a good defence to the action on the bond. He therefore gave judgment for the defendant.

Clavell Salter, *K.C.*, and *Hansell*, for the plaintiffs. The general rule of English law is that, where parties contract with one another at arm's length, both being free agents and on equal terms, mere non-disclosure of a material fact without fraud is no ground for avoiding the contract. From this rule contracts of insurance form an exception. In the case of such contracts a special rule of law has been evolved arising out of the special relations of the parties. It has been said that this is because

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such contracts are "uberrimæ fidei," but it may be doubted whether the difference between those and other contracts should be put on the ground of any different standard of good faith being applicable to them. The principle appears to be that, having regard to the peculiar nature of the contract, the law implies a condition that all material facts shall be disclosed. It has never been laid down that such an implication arises in the case of a contract of suretyship. It is not denied that the non-disclosure of the fact that the servant had been guilty of defalcations previously to the making of the contract of suretyship might be some evidence of fraud, but here the Lord Chief Justice has distinctly found that there was no fraud or mala fides on the part of the plaintiffs. If the defendant's counsel intended to suggest the existence of fraud, he should not have allowed the jury to be discharged, but should have insisted on the question of fraud being submitted to them. It has been laid down in many cases that the doctrine with regard to concealment of a material fact which is applicable to marine insurance cases does not apply to the contract of suretyship: see *North British Insurance Co.* v. *Lloyd* (1); *Lee* v. *Jones.* (2) In marine insurance cases the concealment of a material fact, i.e., any fact which might affect the mind of the underwriter so as to deter him from undertaking the risk, will avoid the contract, although the fact so concealed may have no relation to the risk which has caused the loss, and there may have been no fraud on the part of the assured, but it is contended that, for the purpose of avoiding the contract of suretyship, the concealment of a material fact must have been fraudulent. The judgments in *Smith* v. *Bank of Scotland* (3) and *Railton* v. *Mathews* (4) are not really inconsistent with, but on the contrary seem to support, the view that for the purpose of avoiding a contract of suretyship the concealment of a material fact must be fraudulent. The issue whether there was fraud appears to have been raised in those cases, and they were sent down for a new trial, which, apparently, would not have been necessary, if the existence of fraud was immaterial, because facts similar to those in the present case

(1) (1854) 10 Exch. 523.
(2) (1864) 17 C. B. (N.S.) 482.
(3) (1813) 1 Dow, 272.
(4) (1844) 10 Cl. & F. 934.

were already proved. In *Phillips* v. *Foxall* (1) Blackburn J. still adhered to the opinion expressed by him in *Lee* v. *Jones* (2) that the concealment of the fact that the servant whose fidelity was guaranteed had been guilty of dishonesty would be evidence of fraud, but he declined to go further and say that, in the absence of fraud, such a concealment would avoid the contract of suretyship. The decisions do not shew that there is any rule of equity which would avoid the contract of suretyship on the ground of mere non-disclosure of a material fact. If that were the rule in equity, there would really be no distinction in this respect between contracts of suretyship and contracts of insurance. The expression "undue concealment" has been used in cases of this kind, e.g., in *Railton* v. *Mathews*. (3) Assuming that this imports that "fraud" is not essential for the purpose of avoiding the contract of suretyship, it would be a question of fact for the jury or other tribunal which has to determine questions of fact whether, having regard to the circumstances of the particular case, the concealment was undue in the sense that the fact concealed was one of such a nature that there was a duty on the part of the plaintiffs to make disclosure of it. The Lord Chief Justice has treated the question as one of pure law, and not of fact. He has in effect held that the mere non-disclosure of a material fact as a matter of law avoids the contract of suretyship. It is contended that this is not correct. If it were held that the non-disclosure of the clerk's previous defalcations amounted to an implied representation that he was honest, so far as the plaintiffs knew, it would surely be necessary to shew that the representation induced the contract of suretyship, and it would be a question for the jury whether, if the defendant had known of the clerk's previous defalcations, he would not, nevertheless, have signed the bond. It does not follow as a conclusion of law that he would not have done so. These were questions for the jury, but the Lord Chief Justice has decided the case upon the view that mere non-disclosure of a material fact as a matter of law avoids the contract. On the footing that the question whether the concealment was "undue" was one of fact, the

(1) (1872) L. R. 7 Q. B. 666, at p. 679. (2) 17 C. B. (N.S.) 482.
(3) 10 Cl. & F. 934.

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onus lay on the defendant, and his counsel should not have acquiesced in the discharge of the jury without a finding by them on the question. The cases with regard to condonation of dishonesty by the servant subsequent to the making of the contract of suretyship have no bearing on the present case. Those cases depend on the right of the surety to have the servant dismissed upon the occurrence of such dishonesty. [They also cited *Hamilton* v. *Watson* (1); *Wythes* v. *Labouchere*. (2)]

Lewis Thomas, K.C., and *A. Macpherson*, for the defendant, were not called upon to argue.

March 11. VAUGHAN WILLIAMS L.J. read the following judgment:—This is an appeal by the plaintiffs, the London General Omnibus Company, against the judgment of the Lord Chief Justice without a jury. The jury were in fact sworn, and heard all the evidence. The Lord Chief Justice then said to Mr. Salter, the counsel for the plaintiffs, "Now, Mr. Salter, are you going to ask the jury to disbelieve this gentleman?" The witness was the defendant, Mr. Holloway, and he had sworn that, when he signed the bond sued on, he had no idea that there was any previous misconduct by the clerk in respect of whose fidelity he, as a surety, executed the bond. Mr. Salter answered, "I am going to submit that there was no duty to disclose, and next I am going to submit that there was no evidence of overlooking any defalcation subsequently to the deed." The Lord Chief Justice then said, "There is no evidence of any overlooking. I see nothing to be left to the jury." Mr. Clavell Salter answered, "Then the question whether the bond stands, I submit, is a question for your Lordship. There was no disclosure. If there was a duty to state it," (i.e., the defalcation of the clerk to the knowledge of the plaintiffs prior to the execution of the bond) "then that duty was not discharged." The Lord Chief Justice found distinctly that there was no fraud on the part of the plaintiffs.

It follows that the only question we have to decide is whether, in the absence of fraud on the part of the person taking the

(1) (1845) 12 Cl. & F. 109.
(2) (1859) 5 Jur. (N.S.) 499; 3 De G. & J. 593.

security, non-disclosure by him of any, and, if so, what, fact within his knowledge, material for the surety to know, will vitiate the bond. It was suggested during the argument that, although it may be true that, generally, it is not good law, except in the case of policies of insurance, to say that the non-disclosure of a fact within the knowledge of the person taking the security, material for the surety to know, will vitiate the security, yet it may be good law in a case where the non-disclosed fact is of such a character that the tribunal before which the question of the vitiation of the bond comes is of opinion that the non-disclosure constitutes a misrepresentation by reason of the non-disclosed fact being inconsistent with a presumed basis of the contract of suretyship, e.g., that the clerk whose fidelity or honesty is the subject of the security has not, to the knowledge of the person taking such guarantee, been guilty of a breach of honesty in the performance of the duties of the very office or service, fidelity and honesty in which is guaranteed. If, for instance, the servant whose fidelity is the subject of the security is, as he was in this case, a clerk who has to collect and pay over money, it is assumed by both parties to an ordinary contract of suretyship that such a servant is not to the knowledge of the master a man who has been guilty of dishonest dealing with moneys collected by him. Not to disclose such dishonesty is a misrepresentation, it may be innocently made, but still is a misrepresentation, because by non-disclosure the master must be assumed to be contracting on the assumption which I have just mentioned, i.e., the assumption by both parties to a contract of suretyship in respect of the service of such a servant that the suretyship relates to a servant whom the master at the time of taking the security does not know to have been guilty of dishonesty in such service, that is to a presumably honest man, and not to a man known to be dishonest. I do not think that the importance of the non-disclosed fact in regard to the duties the subject of the suretyship is necessarily a mere question of law; it may be a question of fact to be decided by a jury or judge sitting alone. The question for judge or jury to put to himself or themselves seems to be, Would the surety have entered into this contract of suretyship if the non-disclosed fact had been disclosed to him?

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Blackburn J. in *Lee* v. *Jones* (1) says: "I think that it must in every case depend upon the nature of the transaction, whether the fact not disclosed is such that it is impliedly represented not to exist; and that must generally be a question of fact proper for a jury." He goes on to deal with the question whether in that case there was evidence of fraud to go to the jury, but I do not regard this as a statement that non-disclosure and the misrepresentation to be inferred therefrom must be fraudulent to avoid or vitiate a contract of suretyship, for the only question to be dealt with in that case was on the leave reserved to enter a verdict for the plaintiffs, if there was no evidence of fraud to support the defendant's plea of fraud.

In fact in many of the common law cases cited before us the only question was whether there was evidence to support a plea of fraud, and not whether misrepresentation inferred from non-disclosure would, independently of fraud, vitiate a contract of suretyship. Again in *Hamilton* v. *Watson* (2) Lord Campbell, after dissenting from the proposition of the appellants' counsel that, when a bank takes a security from a person becoming surety for one of its customers, the managers of the bank are bound to communicate to the proposed surety every information which, in relation to the suretyship, it may be material for him to know, and, if such information is not communicated, the surety is released, says, "unless questions be particularly put by the surety to gain this information, I hold that it is quite unnecessary for the creditor, to whom the suretyship is to be given, to make any such disclosure: and I should think that this might be considered as the criterion whether the disclosure ought to be made voluntarily, namely whether there is anything that might not naturally be expected to take place between the parties who are concerned in the transaction, that is, whether there be a contract between the debtor and the creditor, to the effect that his position shall be different from that which the surety might naturally expect: and, if so, the surety is to see whether that is disclosed to him. But if there be nothing which might not naturally take place between these parties, then, if the surety would guard against particular perils, he must put the question

(1) 17 C. B. (N.S.) 482, at p. 506. (2) 12 Cl. & F. 109, at p. 119.

and he must gain the information which he requires." Lord Campbell, it is true, takes as his example of what might not be naturally expected an unusual contract between creditor and debtor whose debt the surety guarantees, but I take it this is only an example of the general proposition that a creditor must reveal to the surety every fact which under the circumstances the surety would expect not to exist, for the omission to mention that such a fact does exist is an implied representation that it does not. Such a concealment is frequently described as "undue concealment."

I have dealt with these cases because they were much relied on by Mr. Clavell Salter, but the most important case on the subject seems to be the case of *Railton* v. *Mathews* (1) in the House of Lords. In that case, which was tried in Scotland in the Scottish Court, the presiding judge directed the jury that the concealment to be undue must be wilful and intentional, with a view to the advantage the employers were thereby to gain, and the House of Lords held that the direction was wrong in point of law, and that mere non-communication of circumstances affecting the situation of the parties, material for the surety to be acquainted with, and within the knowledge of the person taking the surety bond, is undue concealment, though not wilful or intentional, or with a view to any advantage to himself. Lord Cottenham says (2): "It has not been contended, and it is impossible to contend, after what Lord Eldon lays down in the case of *Smith* v. *Bank of Scotland* (3), that a case may not exist in which a mere non-communication would invalidate a bond of suretyship." Lord Cottenham then continues (4): "In my opinion there may be a case of improper concealment or non-communication of facts which ought to be communicated, which would affect the situation of the parties, even if it was not wilful and intentional, and with a view to the advantage the parties were to receive." Then I find (5) Lord Campbell saying, "If the defenders had facts within their knowledge which it was material the surety should be acquainted with, and which the defenders did not

(1) 10 Cl. & F. 934.
(2) 10 Cl. & F. 940.
(3) 1 Dow, 272, at p. 292.
(4) 10 Cl. & F. 941.
(5) 10 Cl. & F. 943.

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disclose, in my opinion the concealment of those facts, the undue concealment of those facts, discharges the surety"; and later he says, "The liability of a surety must depend upon the situation in which he is placed, upon the knowledge which is communicated to him of the facts of the case, and not on what was passing in the mind of the other party or the motive of the other party. If the facts were such as ought to have been communicated, if it was material to the surety that they should be communicated, the motive for withholding them, I apprehend, is wholly immaterial." I see no reason to suppose that Lord Campbell meant any different materiality from that which I have defined earlier in my judgment. The representation to be implied from the non-communication must relate to facts which the person giving the security had a right to suppose to exist.

I think it right to add that I find it difficult to understand what Pollock C.B. in *North British Insurance Co.* v. *Lloyd* (1) means when he is dealing with *Railton* v. *Mathews* (2) and *Smith* v. *Bank of Scotland* (3), and concludes his judgment with these words: "We think the doctrine laid down by Lord Campbell perfectly correct and applicable to the guarantee in question. The non-disclosure of the circumstance of the change of security, even if it had been material, would not have vitiated the guarantee, unless it had been fraudulently kept back, and there was no ground to impute fraud in fact to the plaintiffs or their agents."

In my judgment, the judgment of the Lord Chief Justice was quite right. I think that the non-disclosure by the plaintiffs of the fact that to their knowledge the clerk had been guilty of defalcations in their service before the bond was executed constituted a representation that he had not been guilty of such dishonesty.

The appeal therefore fails and must be dismissed.

FARWELL L.J. I am of the same opinion. Whether it would have been necessary at common law to prove fraud in cases like the present I express no opinion, because I am clear that in equity from very early times it was unnecessary for a surety to prove

(1) 10 Exch. 523, at p. 535. (2) 10 Cl. & F. 934.
(3) 1 Dow, 272.

fraud in the case of a material misrepresentation inducing the contract; and, since the Judicature Act, if there is any difference between the rules of common law and those of equity, the rule of equity is to prevail. Sureties have for very many years been favoured in equity, and in various cases relief has been given to them from time to time on what has been called the clearest and most evident equity—Lord Eldon calls it in one case the "good faith of the contract,"—and rules were laid down in equity in favour of sureties which have been binding for years; for example, the equitable doctrine that entitled a surety to be discharged if the creditor gave time to the debtor, which was acted on in *Rees* v. *Berrington* (1), where an injunction was granted to restrain an action at law brought by the executors of the creditor who obtained the security and had given time to the debtor.

We have, therefore, to consider whether there is in this case any ground for relief in equity before the Judicature Acts which can now be granted by the High Court. Of course, if there were fraud, fraud unravels all contracts, both at law and in equity, but in a case like the present fraud was not necessary to entitle the surety to relief in equity. Innocent misrepresentation is sufficient, and, although the doctrine by which uberrima fides is required in insurance cases is not applicable to the same extent in suretyship cases, still the surety is entitled to relief on the ground of non-disclosure of matters which ought to have been communicated to him, whether the non-communication was or was not innocent.

I will not repeat again the passages which Vaughan Williams L.J. has already read from the judgments of Lord Cottenham and Lord Campbell in *Railton* v. *Mathews*. (2) The passage referred to from the judgment of Lord Eldon in *Smith* v. *Bank of Scotland* (3) is as follows: "If a man found that his agent had betrayed his trust, that he owed him a sum of money, or that it was likely he was in his debt; if under such circumstances he required sureties for his fidelity, holding him out as a trustworthy person, knowing, or having ground to believe, that he was not so: then it was agreeable to the doctrines of equity,

(1) [1795] 2 Ves. 540. (2) 10 Cl. & F. 934.
(3) 1 Dow, 272, at p. 292.

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at least in England, that no one should be permitted to take advantage of such conduct, even with a view to security against future transactions of the agent." The injury to the surety is the same, whether the non-disclosure was due to fraud or forgetfulness. This is not like the case of a common law action for damages for deceit, where fraud is the gist of the action; it is a case of relief from a contract into which the surety was induced to enter by a misrepresentation made by the person taking the suretyship bond, either wilfully or through forgetfulness. If the element of unfairness is needed to give rise to the equity, it is to be found in the insistence on a contract so induced after the truth is known. The materiality of the fact concealed in this case is to my mind clear. A surety may well be willing to guarantee an employer against defalcations by a servant believed to be honest: it is quite another matter, if the servant has already been found guilty of defalcations. The surety believes that he is making himself answerable for a presumably honest man, not for a known thief.

There is a wide distinction between a case like the present and the cases which have been cited of guarantees for overdrafts given to bankers, such as *Hamilton* v. *Watson* (1) and *Wythes* v. *Labouchere*. (2) Dishonesty may occur, and the guarantee is given to ensure against the chance, but guarantees for overdrafts are required for the purpose, and not on the chance, of being used. A man may have the misfortune to be robbed by his servant in the course of his business; if he is, it is a mischance; but it is perfectly legitimate and usual for a man to carry on his business on borrowed money, including money borrowed from his bankers by way of overdraft, and the surety knows this, and becomes surety for the very purpose of enabling him to do so. There is nothing in such a case which the surety does not know as well as any other member of the community, and nothing therefore which needs to be disclosed to him. The surety may well complain "I did not know that your servant was a thief"; but he cannot be heard to complain "I did not know your customer had been overdrawing his account or what the nature of his business was." This

(1) 12 Cl. & F. 109. (2) 5 Jur. (N.S.) 499; 3 De G. & J. 593.

dishonesty of the servant known to the employer. Lord Eldon in *Walker* v. *Symonds* (1) distinguishes between intentional concealment and actual concealment. The latter is sufficient to dissolve the contract of suretyship in the case of a fidelity guarantee; or, as the same matter is put by Story (see Story's Equity Jurisprudence, § 215), "If a party knowing himself to be cheated by his clerk, and, concealing the fact, applies for security in such a manner, and under such circumstances, as holds the clerk out to others as one whom he considers as a trustworthy person; and another person becomes his security, acting under the impression that the clerk is so considered by his employer; the contract of suretyship will be void; for the very silence, under such circumstances, becomes expressive of a trust and confidence held out to the public, equivalent to an affirmation."

On the other hand, in the case of the suretyship or guarantee of a financial account, the previous pecuniary dealings between the creditor and the person whose future liability the surety is invited to secure constitute only extrinsic circumstances. They may be material circumstances, such as might affect the judgment of the person who is asked to be surety. But, in the language of Sir Frederick Pollock (Principles of Contract, 8th ed., p. 568), "the creditor is not bound to volunteer information as to the general credit of the debtor or anything else which is not part of the transaction itself to which the suretyship relates: and on this point there is no difference between law and equity." The bank or other creditor cannot reasonably be taken as affirming, by mere silence respecting earlier dealings, the financial ability of the person whom the proposed surety is asked to guarantee. I say "cannot reasonably be taken," because, as Mr. Rowlatt in his work on Principal and Surety, p. 155 (citing *Hamilton* v. *Watson* (2) and other cases), points out, the probable reason for requiring a guarantee is dissatisfaction with the customer's credit. The law will rightly refuse to find in mere silence an implied representation to the surety, in circumstances where the surety cannot reasonably contend that he inferred, in the absence of any statement to the contrary, that a particular

(1) (1818) 3 Swans. 1, at p. 62. (2) 12 Cl. & F. 109.

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Kennedy L.J.

state of facts existed different from that which did in truth exist. Blackburn J. in stating his reasons for his judgment in the Exchequer Chamber in *Lee* v. *Jones* (1) clearly held that there was no obligation on the creditor to disclose to the surety every circumstance within his knowledge material for the surety to know, and pointed out that in his opinion great mischief would ensue if the law imposed upon the creditor any such obligation.

For the reasons which I have given I am of opinion that the facts of this case bring it within the class to which the law as laid down by the House of Lords in *Railton* v. *Mathews* (2) applies; that the decisions in *Hamilton* v. *Watson* (3) and in the other cases where the guarantee was of a different character are not in point; and that the fact of the non-disclosure by the plaintiffs in this action to the surety whom they have sued of the previous misconduct of their servant, whose honesty the defendant was invited to guarantee, avoided the contract contained in the suretyship bond, although such non-disclosure was not tainted by any fraudulent intent. The judgment, therefore, of the Lord Chief Justice was perfectly right, and this appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Joynson-Hicks, Hunt, Moore & Cardew.*

Solicitors for defendant: *Greenwell, Higham & Co.*

(1) 17 C. B. (N.S.) 482, at p. 503. (2) 10 Cl. & F. 934.
(3) 12 Cl. & F. 109.

E. L.

THE DIRECTOR OF PUBLIC PROSECUTIONS *v.* BLADY.

1912
Jan. 18.

Criminal Law—Evidence—Admissibility—Living on Earnings of Prostitution—Prostitution of Wife—Evidence of Wife—Vagrancy Act, 1898 (61 & 62 *Vict. c.* 39), *s.* 1.

The defendant was charged before a Court of summary jurisdiction under s. 1 of the Vagrancy Act, 1898, with knowingly living wholly or in part on the earnings of prostitution. The person on the earnings of whose prostitution he was alleged to be living was his wife, and the prosecution was commenced by her :—

Held by Pickford and Avory JJ. (Lush J. dissenting), that the wife was not an admissible witness for the prosecution.

Case stated by a metropolitan magistrate.

The respondent was charged upon an information laid originally by one Helena Blady for that he had knowingly lived wholly or in part on the earnings of prostitution of the said Helena Blady, his wife, contrary to s. 1 of the Vagrancy Act, 1898. (1) The magistrate remanded the respondent to a later date.

On that date the prosecution was undertaken by the appellant, the Director of Public Prosecutions. On the hearing of the charge Helena Blady was tendered on behalf of the appellant as a witness for the prosecution against the respondent. It was admitted that Helena Blady was the lawful wife of the respondent.

The magistrate refused to hear the evidence of Helena Blady on the ground that the evidence of a wife is not admissible against her husband upon the hearing of a charge against the husband of living on the earnings of prostitution of his wife contrary to s. 1 of the Vagrancy Act, 1898.

The question for the Court was whether the magistrate was right in refusing to hear the evidence of Helena Blady.

Travers Humphreys, for the appellant. The magistrate ought to have admitted the evidence of the wife. She is in reality the prosecuting party. The offence may have been, and probably

(1) Vagrancy Act, 1898 (61 & 62 Vict. c. 39), s. 1: "(1.) Every male person who (*a*) knowingly lives wholly or in part on the earnings of prostitution . . . . shall be deemed a rogue and vagabond within the meaning of the Vagrancy Act, 1824, and may be dealt with accordingly."

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was, accompanied by violence and coercion towards her, and she is the only one who can know the facts. No doubt the general rule is that the wife is not admissible as a witness against her husband; but from an early period an exception was admitted to the rule where the offence charged touched the person of the wife and where therefore she must be cognizant of it and might perhaps be the only person cognizant of it: *Reeve* v. *Wood* (1), per Blackburn J. The exception applies in all cases affecting the liberty and person of the wife: *Rex* v. *Wakefield* (2), a case of abduction. *John Brown's Case* (3) was a similar case. In *Lord Audley's Case* (4), where a husband was charged with aiding and abetting in a rape upon his wife, one of the questions submitted to the judges was whether the wife in that case might be a witness against her husband for the rape. The answer was that she might, for she was the party wronged; otherwise she might be abused. Where from the nature of the inquiry the information to be expected is peculiarly within the knowledge of the wife, there the wife is an admissible witness for the prosecution: Phillipps on Evidence, 10th ed., pp. 80 et seq.; *Reg.* v. *Lord Mayor of London.* (5) This is ex necessitate, for to preclude her from giving evidence would be in certain cases to allow a great wrong to go unpunished. The decision of the Court in *Reeve* v. *Wood* (1), that a wife was not an admissible witness against her husband on a charge under s. 3 of the Vagrancy Act, 1824, of neglecting and refusing to maintain her, was altered by the Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36).

The respondent was not represented.

PICKFORD J. In my opinion the magistrate was right in this case, although it would be a satisfactory and beneficial result if in these cases a wife could give evidence against her husband. At common law the rule, whatever its origin might be, was that a wife could not give evidence against her husband. There were exceptions, but they were confined to cases in which the offence itself concerned the liberty, health, or person of the wife. If we

(1) (1864) 5 B. & S. 364.
(2) (1827) 2 Lew. C. C. 279.
(3) (1674) 1 Vent. 243.
(4) (1631) 3 St. Tr. 402.
(5) (1886) 16 Q. B. D. 772.

were to extend the exceptions beyond those limits we should be legislating. In the present case the offence does not necessarily involve anything of the kind. It does not necessarily involve a wife in any way. The offence is living on the earnings of prostitution, it may be of a wife or of anybody else, and therefore it does not concern the person, or the liberty, or the health of a wife. Where the prostitution happens to be that of the defendant's wife, it might be very advisable, if permissible, for the prosecution to call the wife in proof of the offence. If the wife were so called as a witness, it might appear that she had been coerced into prostitution, or it might not. In either case the offence would be proved. In other words injury to the person or health of the wife is no part of the offence charged. The fact that a wife has been coerced or ill-treated by her husband does not of itself make her an admissible witness against him where injury to the person, liberty, or health of the wife is no part of the offence with which he is charged. The exception to the rule of common law has never been extended to affect the evidence of a wife whose position is that of a mere witness on a charge against her husband of an offence not involving injury to her person, liberty, or health. Therefore this case does not come within any of the exceptions indicated in any of the cases cited to us, and in my opinion the wife's evidence was not admissible. The magistrate was right and this appeal must be dismissed.

AVORY J. I am of the same opinion. To the general rule of law that in the case of husband and wife one is not a competent witness against the other on a criminal charge there is, so far as I know, only one exception at common law, namely, that either is a competent witness on any charge which affects his or her liberty or person. The cases cited to us by Mr. Humphreys in support of his argument are cases in which the liberty or person of the wife has been affected by force or fraud. In my opinion the charge in the present case under the Vagrancy Act, 1898, is not a charge affecting the liberty or person of the wife either by force or fraud. The offence is equally constituted whether the wife is or is not a consenting party. It is no part of the offence to shew that her liberty or

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her person was affected either by force or fraud, and therefore in my opinion it is impossible to bring it within the exceptions to the rule of the common law. The Criminal Evidence Act, 1898, is limited to one of the offences specified in s. 3 of the Vagrancy Act, 1824. The magistrate, therefore, was right in refusing to admit the evidence, and this appeal must be dismissed.

LUSH J. I regret being obliged to come to a different conclusion. The foundation of the rule which prevented a wife from giving evidence against her husband was the fact that they were one person in the eye of the law. No doubt that rule was applied in every case except where it was necessary either for the safety of the wife or for her wellbeing to relax it. The rule shewed itself in strange ways both in the criminal and in the civil law. Husband and wife being one person could not be indicted or convicted of conspiracy one with the other. A wife could not be convicted of being an accessory after the fact when her husband had committed a felony; but the rule was relaxed in the converse case, and a husband could be convicted of being an accessory after the fact in the case of his wife's felony. A Court of Equity, after the separate estate of a married woman was created, allowed a wife to give evidence against her husband in proceedings taken by her for the protection and security of her separate estate, because it would be inconsistent to recognize the existence of a wife's separate estate and not to give her the opportunity of giving evidence for the purpose of protecting or securing it.

Apart from treason, the only cases in which a wife was competent to give evidence in support of a criminal charge against her husband were cases where, if the general rule were not relaxed, the wife would be exposed to the cruelty of her husband. The ordinary case in which the question arose was where the husband used, or threatened to use, violence to her. If he threatened it, she could exhibit articles of the peace against him; if he used it, she could give evidence of the offence. The rule was not confined to actual assaults. Cases have been cited to us by Mr. Humphreys in which by false pretences before

marriage the woman was induced to go through the form of marriage with her husband. There the husband and wife were one in point of law as soon as they were married, but to preclude the wife from giving evidence would have been to prevent any inquiry into the matter at all. I do not of course say that a judge should usurp a jurisdiction which he has not, but I do say that we ought not to disclaim an important principle merely because the particular instance before us has not hitherto been the subject of decision. If by legislation a particular act is made an offence which, when all the facts are known, may, like assault or abduction, involve an injury to the person or liberty of the wife, a wrong done to her against her will, then in my view it is wrong to preclude the wife from giving evidence on the charge. Until it is known what the evidence is it is impossible to say whether this particular offence does or does not involve such an injury to the person, liberty, or health of the wife. It may do so, and that is enough, and if it does it is a wrong which can never be proved or may never be proved unless the wife can give evidence. In my opinion the proper course would have been to admit the evidence of the wife in this case, even though, when admitted, it might establish an offence against the State rather than against the wife. The fact that the evidence may not establish an offence against the wife is to my mind no reason for saying that in a case like this the evidence is not admissible. I think, therefore, that this case falls within the principle of the exception to which I have referred, and that the magistrate was wrong in rejecting the evidence.

Appeal dismissed.

For the prosecution: *The Director of Public Prosecutions.*

W. H. G.

1912
Jan. 25, 26.

LANDAUER & CO. *v.* CRAVEN & SPEEDING BROTHERS.

Sale of Goods—Price to include Cost, Freight, and Insurance—Cash in Exchange for Shipping Documents—Shipment within certain Dates—Shipment by Steamer or Steamers direct or indirect to Port of Destination—Transhipment—Tender of Bill of Lading from Port of Transhipment.

Sellers agreed to sell 400 bales of hemp at a price to include cost, freight, and insurance. By the terms of the contract of sale the hemp was to be shipped from a port in the Philippine Islands or from Hong Kong by steamer or steamers direct or indirect to London between October 1 and December 31, 1909; payment was to be by cash in exchange for shipping documents, and disputes under the contract were to be settled by arbitration.

The sellers then purchased from B. & Co. 400 bales of hemp. This hemp had been shipped at Manila, a port in the Philippine Islands, under bills of lading dated at that place December 28, 1909, for delivery at Hong Kong to the order of the shippers; it was intended for transhipment and was transhipped on a steamer bound for London, the bills of lading being dated at Hong Kong March 25, 1910; it had been insured by the shippers from Manila to London.

The sellers tendered to the buyers in fulfilment of the contract of sale the bills of lading from Hong Kong and the policy of insurance from Manila to London. The buyers paid the contract price under protest, contending that these documents were not a good tender under the contract. The dispute was referred to arbitration.

The arbitrator found that it was a usual course, when goods were shipped from Manila to London, to tranship them at Hong Kong, but to ship them in the first instance at Manila on a through bill of lading from Manila to London; in so far as it was a question of fact, he found that, on a contract of sale of goods on cost, freight, and insurance terms, it was by mercantile usage, unless otherwise agreed, the duty of the seller to provide by contract of affreightment for the carriage of the goods from the port of shipment to the port of destination named in the contract, and by an indorsed bill of lading, or otherwise, to transfer to the buyer the benefit of the rights created by the contract of affreightment between the shipper and the shipowner for the entire voyage from the port of shipment to the port of destination:—

Held, that the tender of the documents was not a good tender under the contract, first, because it did not include a contract of affreightment to London made before December 31, 1909, and, secondly, because it did not include a contract of affreightment from Manila to Hong Kong.

AWARD in the form of a special case stated by an umpire in an arbitration.

By a contract dated May 5, 1909, Messrs. Landauer & Co. sold

to Messrs. Craven & Speeding Brothers 500 bales of Manila hemp mark $\frac{PH}{X}$ at the price of 21*l.* 10*s.* plus ½ per cent. per ton of eight bales cost, freight, and usual f. p. a. insurance on the following amongst other terms:—

(*a*) Shipment to be made from a recognized shipping port or ports in the Philippine Islands or from Hong Kong or Singapore by steamer or steamers direct or indirect to London between October 1 and December 31, 1909, both inclusive.

(*b*) Declaration to be made with due despatch but not later than sixty days from date of bill of lading.

(*c*) Extension of time for shipment to be allowed to the seller at a reduction of price of 1¼ per cent. up to seven days and 2½ per cent. up to fourteen days.

(*d*) Bills of lading to be made out in sets of not exceeding 250 bales each.

(*e*) Clause 15 of the contract was as follows: "Payment to be made by cash within twenty-four hours of the vessel reporting at the Custom House in exchange for shipping documents, but should the arrival of the vessel be delayed beyond the due date of the draft at three months sight drawn against the original Manila invoice, the seller to have the right to call upon the buyer to take up the documents at the maturity of the draft."

(*f*) Any dispute arising out of this contract was to be settled by arbitration in accordance with certain clauses indorsed on the contract, one of which provided that all questions and matters referred to arbitration should be referred to the arbitration of two persons, recognized brokers or dealers or merchants, buyer and seller each nominating one; in case the arbitrators should be unable to agree, an umpire was to be appointed by the arbitrators. Any award was to be absolutely final and binding on both parties, and the submission and reference were to be subject to the provisions of the Arbitration Act, 1889.

The date of the bill of lading attached to the shippers' draft was to be conclusive evidence of the date of shipment.

One hundred bales of the hemp parcel of the 500 bales comprised in the contract were duly tendered to and accepted by the

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buyers and paid for by them on February 18, 1910. No dispute arose in connection with that 100 bales.

A dispute arose between the buyers and the sellers as to whether two parcels consisting of 150 bales and 250 bales respectively of hemp, tendered by the sellers to the buyers under the contract to make up the balance of the 500 bales, were a good tender under the contract. Each party appointed an arbitrator and the arbitrators appointed an umpire to whom the dispute was referred.

The umpire awarded and determined that the 150 and 250 bales were not a good tender and that the buyers were not bound to accept the same and were entitled to recover damages from the sellers for breach of the contract. The award was made subject to the opinion of the Court upon the following

CASE.

On December 28, 1909, Messrs. Warner, Barnes & Co., Limited, of Manila, shipped on board the steamship *Rubi* at Manila, under two bills of lading dated Manila, December 28, 1909, 150 and 250 bales of Manila hemp of the mark $\frac{\text{PH}}{\text{X}}$ for delivery to shippers' order at Hong Kong.

The hemp was invoiced to Bibby Brothers & Co., London, under two invoices dated Manila, December 28, 1909, in the following terms: "Shipped on board the s.s. *Rubi* . . . . bound for Hong Kong for transhipment thence per other steamers to London for account and risk of the concerned and consigned to order." The hemp at the time of shipment was bona fide intended by the shippers to be transhipped at Hong Kong to London, and the shippers caused to be forwarded to Mr. J. C. Moxon, a shipping agent in Hong Kong, the bills of lading with the requisite instructions for him to ship the goods forthwith to London. He did not, however, procure ship room for forwarding the hemp from Hong Kong to London until March 25, 1910.

The umpire found as a fact that there was no want of due diligence on the part of Warner, Barnes & Co. or of J. C. Moxon in endeavouring to find room for the forwarding of the hemp

from Hong Kong to London, and that the delay at Hong Kong was due to causes beyond their control.

Warner, Barnes & Co., Limited, drew two bills of exchange dated December 28, 1909, upon Bibby Brothers & Co. in respect of the hemp. They were attached to duplicates of the Manila bills of lading and the under-mentioned policies.

Warner, Barnes & Co., Limited, on December 28, 1909, effected insurances on the hemp by policies free from particular average in the usual terms at and from Manila to Hong Kong per s.s. *Rubi* and thence per other steamer to London "with leave to call at ports en route including risk of transhipment and of fire while at transhipping port."

The sellers purchased the 250 and 150 bales of hemp from Bibby Brothers & Co. on cost, freight, and insurance terms.

On February 3, 1910, the sellers declared in writing to the buyers in part and further part fulfilment respectively of the above contract of May 5, 1909, the 150 and 250 bales of hemp of the mark $\frac{PH}{X}$ per s.s. *Rubi* to Hong Kong, thence per steamer to London. Bill of lading dated December 28, 1909.

On March 25, 1910, the 250 and 150 bales were shipped by J. C. Moxon on board the s.s. *Antilochus* at Hong Kong for London under two bills of lading for 150 and 250 bales respectively to order, both dated March 25, 1910.

By letter dated May 4, 1910, the sellers gave notice to the buyers that the bales of hemp per s.s. *Rubi* and steamer C. D. 5. 5. 09 were arriving per s.s. *Antilochus* due in London on May 12, and enclosing invoices.

On May 7, 1910, the buyers paid the sellers for the hemp, but without prejudice to the buyers' rights and before the arrival of the goods, under clause 15 of the contract, and subsequently claimed arbitration upon the ground that the goods were not valid tender against the contract.

The steaming distance from Manila to Hong Kong is 630 miles, and the goods after arriving in Hong Kong lay in warehouse there until shipment on board the *Antilochus* on or about March 25, 1910. The *Antilochus* arrived in London on May 17 with the goods on board.

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The only bills of lading in London on which delivery of the goods could be taken, and on which delivery was in fact taken, were the two duly indorsed bills of lading for 250 and 150 bales of hemp respectively per s.s. *Antilochus*, dated in Hong Kong March 25, 1910, and these were the only bills of lading which the sellers held and the benefit of which they were in a position to transfer to the buyers.

The umpire found as follows: "It is quite usual for goods shipped from Manila for London to be carried via Hong Kong and to be there transhipped to London. Such goods are usually shipped at Manila under a through bill of lading providing for the carriage on the whole journey from Manila to London via Hong Kong. No evidence was given before me of any custom affecting the Manila hemp trade or varying in any way the well-known mercantile usage with regard to contracts of sale of goods on cost, freight, and insurance terms. If and so far as it was a question of fact, I find that on a contract of sale of goods on cost, freight, and insurance terms it is by mercantile usage, unless otherwise agreed, the duty of the seller to provide by a contract of affreightment for the carriage of the goods from the port of shipment to the port of destination named in the contract, and by an indorsed bill of lading, or otherwise, to transfer to the buyer the benefit of the rights created by the contract of affreightment between the shipper and the shipowner for the entire voyage from the port of shipment to the port of destination, so that if during any part of that voyage the goods should be lost or damaged by default of the shipowner or of those for whom he is responsible, the buyer may have a remedy against the shipowner."

The buyers contended that the tender of the 150 and 250 bales of hemp by the sellers was not a good tender upon the ground that the goods were not shipped to London direct or indirect between October 1 and December 31, 1909, both inclusive, and that even if they were so shipped the documents in London which were transferred to the buyers under clause 15 of the contract did not include any bill of lading from Manila, but only bills of lading from Hong Kong dated March 25, 1910, and that the documents so transferred were accordingly not the documents to which the buyers were entitled under the contract.

The sellers contended that the tender of the hemp was a good tender under the contract, and alleged that the hemp was shipped directly or indirectly from Manila to London between October 1 and December 31 within the meaning of the contract, and that the buyers were only entitled to a bill of lading entitling them to take delivery in London from the ship and were not entitled to a bill of lading for the whole voyage from Manila to London.

The question for the opinion of the Court was whether the tender of the goods on May 4, 1910, was a good tender under the contract.

Bailhache, *K.C.*, and *Leck*, for Landauer & Co. Two points arise in this case. First, have the terms of the contract as to the date of shipment been fulfilled? In other words, was there a shipment from a port in the Philippine Islands, or from Hong Kong, by steamer direct or indirect to London between October 1 and December 31, 1909? In fact the goods were shipped at Manila on December 28, 1909. By the bills of lading the goods were to be delivered at Hong Kong to the shippers' order. They were intended to be and were subsequently transhipped at Hong Kong for London on the terms of bills of lading dated March 15, 1910. Was this a shipment at Manila direct or indirect to London between October 1 and December 31? This question is concluded in favour of the sellers in point of law by the decision of Hamilton J. in the unreported case of *Cox, McEuen & Co.* v. *Malcolm & Co.* (1), decided on July 1, 1910, and in point of fact by the finding of the umpire in this case that it is usual for goods shipped from Manila to London to be carried via Hong Kong and to be there transhipped to London. It may be convenient to the buyer to have a through bill of lading, but the fact that there are two bills of lading, one for part and the other for the remainder of the voyage, instead of one bill of lading for the whole voyage, does not affect the question whether there was or was not a shipment from a port in the Philippine Islands within the time specified in the contract.

The second question is whether the shipping documents tendered by the sellers to the buyers were a sufficient tender

(1) (1910) Unreported. See note on p. 107, post.

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under the contract. A seller under a contract of sale at a price to include cost, freight, and insurance is only bound "firstly to ship at the port of shipment goods of the description contained in the contract; secondly to procure a contract of affreightment, under which the goods will be delivered at the destination contemplated by the contract; thirdly to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer; fourthly to make out an invoice as described by Blackburn J. in *Ireland* v. *Livingston* (1) or in some similar form; and finally to tender these documents to the buyer so that he may know what freight he has to pay and obtain delivery of the goods, if they arrive, or recover for their loss if they are lost on the voyage": per Hamilton J., *Biddell Brothers* v. *E. Clemens Horst Co.* (2) These conditions, so far as the contract of affreightment is concerned, were in the present case fulfilled by tendering the Hong Kong bills of lading.

[SCRUTTON J. Must not the seller tender a contract of affreightment covering the whole voyage from the port of shipment to the port of destination—in this case from Manila to London?]

Not if the goods have arrived safe and sound at an intermediate port, as in the present case they did at Hong Kong. They were there shipped in good order and condition. If they were not so shipped, then for any injury received on the voyage from Manila to Hong Kong the shipper would have a right to sue on the Manila bills of lading. The buyer, if he accepted the goods, could claim to have that right transferred to him. But if he receives a bill of lading entitling him to delivery of the goods in good order and condition, what more can he require? With that document and a proper policy of insurance he has all he is entitled to. A sale of goods is still a sale of goods, although the price includes freight and insurance. The fact that the seller pays for freight and insurance and charges the purchaser with those payments in the price of the goods does not convert the sale of goods into an assignment of choses in action. If the seller indorses and hands to the buyer a bill of lading which will enable the buyer to get delivery of the goods, and also, in case

(1) (1872) L. R. 5 H. L. 395, at p. 406.
(2) [1911] 1 K. B. 214, at p. 220.

the goods are lost, a policy of insurance, he has performed his obligation under the contract of sale: *Biddell Brothers* v. *E. Clemens Horst Co.* (1), per Kennedy L.J.

Atkin, K.C., and *Chaytor*, for Craven & Speeding Brothers. The sellers in this case cannot rely upon the shipment at Hong Kong as an original shipment under this contract. That shipment took place after December 31, 1909. If that is the shipment relied on, the buyers were clearly entitled to withhold payment. The sellers must therefore rely on the shipment at Manila on December 28. The first question in the case is, Was this shipment at Manila a shipment by steamer or steamers direct or indirect to London? This question is concluded in favour of the buyers by the findings of the umpire that goods shipped at Manila for carriage to London are usually shipped on a through bill of lading providing for the carriage on the whole journey from Manila to London via Hong Kong, and that, this contract being a sale on c. i. f. terms, it was according to mercantile usage the duty of the sellers to procure such a bill of lading, and by indorsement thereof or otherwise to transfer to the sellers all rights under it for the entire voyage. Those findings distinguish this case from *Cox, McEuen & Co.* v. *Malcolm & Co.* (2) There was no such finding in that case. It was not a case upon the shipping documents at all, but upon the description of the goods sold and those tendered. The only question which was submitted to Hamilton J. and which that learned judge purported to answer was whether the goods in that case had been shipped direct or indirect to London between August 1 and September 30, 1909. Hamilton J. held upon the facts stated that the goods had in point of fact been shipped at Manila indirect to London on September 30. According to the findings of the umpire in the present case, shipment direct or indirect to London means, where transhipment is not necessary, shipment upon a ship on her way directly or indirectly to London as her ultimate destination, or, where transhipment is necessary, shipment under a through bill of lading. The only bill of lading tendered being that made at Hong Kong, there was no shipment at Manila by

(1) [1911] 1 K. B. 934, at p. 956.

(2) Unreported. See note on p. 107, post.

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steamer direct or indirect to London within the meaning of this contract.

Secondly, by the terms of this contract payment was to be made in cash in exchange for shipping documents. That must mean in exchange for such shipping documents as will invest the buyer with all the rights of the shipper in relation to the goods; it does not mean in exchange for such shipping documents as the seller may find it convenient to offer. If, as the sellers contend, the shipment is at Manila, the shipping documents must include the documents relating to the shipment at Manila. The reason and principle of this are clear from the opinion of Blackburn J. in *Ireland* v. *Livingston*. (1) Should the goods not be delivered in consequence of a peril of the sea, the seller is not called upon to pay the freight and he will recover the amount of his interest in the goods under the policy of insurance. If the non-delivery is in consequence of some misconduct on the part of the master or mariners, not covered by the policy, he will recover it from the shipowner. In the present case the documents tendered did not include any contract of affreightment relating to the shipment at Manila. If there had been a failure to deliver in London owing to misconduct on the part of the master or mariners between Manila and Hong Kong not covered by the policy, the buyers could not, as they are entitled to, recover from the shipowner. In truth the Manila bills of lading, through the course of shipment adopted by the shippers, were not live documents, but were spent when the goods were delivered to the shippers' order at Hong Kong. This is another reason for saying that there was no shipment at Manila within the meaning of this contract. According to the argument of the sellers they would have satisfied their obligation under this contract by tendering a bill of lading from Hamburg to London.

Bailhache, K.C., in reply.

Jan. 26. SCRUTTON J. read the following judgment:—This is a special case stated by the umpire to determine whether a tender

(1) L. R. 5 H. L. 395, at p. 407.

of certain hemp on May 4, 1910, was as regards the hemp and the documents a good tender.

The facts were found as follows: By a contract dated May 5, 1909, 500 bales of hemp were sold at a price, cost, freight, and usual f. p. a. insurance. The contract contained the following clauses:—

(*a*) Shipment to be made from a recognized shipping port or ports in the Philippine Islands or from Hong Kong or Singapore by steamer or steamers direct or indirect to London between October 1 and December 31, 1909, both inclusive.

(2.) Payment to be made by cash within twenty-four hours of the vessel reporting at the Custom House in exchange for shipping documents, but, should the arrival of the vessel be delayed beyond the due date of the draft at three months sight drawn against the original Manila invoice, the seller to have the right to call upon the buyer to take up the documents at the maturity of the draft.

(3.) The date of the bill of lading attached to the shippers' draft to be conclusive evidence of the date of shipment.

The original sellers shipped the hemp at Manila, which is a recognized shipping port in the Philippines, to Hong Kong per s.s. *Rubi* on December 28, 1909, under bills of lading to shippers' order at Hong Kong. They sent copies of these bills of lading forward to London attached to sellers' draft to the original buyer. They had at the time of shipment no contract for conveyance of the hemp to London, but intended to tranship the goods at Hong Kong and make such a contract there. But owing to circumstances beyond their control they were unable to make such a contract till March 25, 1910, when the goods were shipped from Hong Kong by the s.s. *Antilochus* under fresh bills of lading dated March 25, 1910, and arrived in London about May 12, 1910.

Meanwhile the sellers in this case, on February 3, 1910, declared the goods per s.s. *Rubi* to the buyers, referring by date to the Manila bills of lading of December 28, and on May 4 the sellers under clause 15 tendered as shipping documents the Hong Kong bills of lading of March 25 and a policy of insurance covering the goods from Manila to London. The Manila bills of

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lading were not in London at the time. The buyers took up the documents under protest and without prejudice, and subsequently claimed to reject them on the ground that the goods were not good tender under the contract, first, because there had not been a shipment to London within the contract time, as at the time of shipment to Hong Kong there was no contract for carriage to London, but only an intention to make such a contract in the future, and secondly because the documents tendered did not include a contract of affreightment covering the goods from Manila to Hong Kong. The umpire has found that the bales were not a good tender without specifically stating his view as to the two contentions put forward, and he states a case on the question whether the tender of the goods on May 4, 1910, which was a tender by the documents referred to, was a good one.

Mr. Bailhache, for the sellers, called my attention to an unreported decision of Hamilton J. in the case of *Cox, McEuen & Co.* v. *Malcolm & Co.* (1), decided in the Commercial Court on July 1, 1910. This was a special case relating to hemp, the contract being in the same terms. The goods were shipped within the contract period at Manila, but under a contract to Hong Kong, and with no contract for carriage to London. They were forwarded from Hong Kong, and rejected in London on the ground that they had not been shipped to London within the contract period, and that the date of the Hong Kong bill, which was after the contract period, was conclusive. Hamilton J. held that there was no necessity in law for the shipment to be under a through bill of lading. He said: "In my opinion the contract does not require in order that a shipment may be made from Manila indirect to London that there shall be a through bill of lading stating on its face that the shipment to the intermediate port is for the purpose of transhipment by the carrier to a London steamer."

If on this point I had only to deal with law I should of course follow this decision, leaving it to be examined, if the parties desired, in the Court of Appeal; but I should very respectfully express my doubts of its correctness. Hamilton J. in his judgment in *Biddell Brothers* v. *E. Clemens Horst Co.* (2) states the first

(1) Unreported. See note on p. 107, post. (2) [1911] 1 K. B. 214, at p. 220.

two duties of the seller c. i. f. as follows: "A seller under a contract of sale containing such terms has firstly to ship at the port of shipment goods of the description contained in the contract; secondly to procure a contract of affreightment, under which the goods will be delivered at the destination contemplated by the contract." I should myself add to the first requisite the words "within the time named in the contract"; and to the second that such a contract must be procured on shipment. I should make the last addition for the reason that the seller must, as soon as possible after he has sent forward the cargo, send forward the documents to the vendee or consignee. See per Lord Esher in *Sanders* v. *Maclean*. (1) If when he ships goods sold c. i. f. London he has no contract for carriage to London, but only an intention to make one, he cannot forward this and tender an intention to the buyer; and in cases where the buyer is near at hand this may delay him in selling and getting his money, for the buyer frequently wants, not to take delivery of the goods, but to sell them afloat to other people; and but for the decision of Hamilton J. I should have thought that the seller c. i. f. must ship his goods under a contract for conveyance to the port of destination which can be transferred, not under a contract part of the way and an intention to make another, which cannot be transferred, and which, as in this case, may not become effective for three months. I should have been disposed to read the words of this contract "shipment at the port in one or more steamers which are going to London direct or indirect," or at any rate "shipment to London, that is, under a contract to carry to London either direct by the same steamer or indirect by transhipment to another steamer," in other words, under a through bill of lading, which both arbitrators find is the usual method of forwarding.

But while prepared to follow the judgment of Hamilton J. on this point as deciding the question of law in this Court, I have a finding of the umpire, on (I was told) evidence given before him, which in my view leaves me free to follow my own opinion. The umpire finds: "No evidence was given before me of any custom affecting the Manila hemp trade or varying in any way the well-known mercantile usage with regard to contracts of sale on cost,

(1) (1883) 11 Q. B. D. 327, at p. 337.

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freight, and insurance terms. If and so far as it is a question of fact, I find that on a contract of sale of goods on cost, freight, and insurance terms it is by mercantile usage, unless otherwise agreed, the duty of the seller to provide by a contract of affreightment for the carriage of the goods from the port of shipment to the port of destination named in the contract, and by an indorsed bill of lading, or otherwise, to transfer to the buyer the benefit of the rights created by the contract of affreightment between the shipper and the shipowner for the entire voyage from the port of shipment to the port of destination." I read this as a finding of fact that by mercantile custom a seller c. i. f. must obtain on shipment a through contract of affreightment to the ultimate destination. If so, what would be the law in the absence of mercantile custom does not apply. If therefore the decision of the umpire proceeded on the ground that there was no contract to carry to London made before December 31, 1909, in respect of goods shipped at Manila, I hold it was correct.

But the other objection was to the documents tendered, which only included the bill of lading from Hong Kong and not the bill of lading from Manila to Hong Kong. This point might have been raised in *Cox, McEuen & Co.* v. *Malcolm & Co.* (1), but was not. Hamilton J. does not deal with it, and indeed expressly limits himself to the points raised by the arbitrator. If the umpire's decision has proceeded on this ground, I am of opinion it was also correct. The buyer wants the bill of lading for two purposes—first to take delivery, for which purpose the Hong Kong bill will suffice; secondly to claim on the shipowner for any breach of the contract of affreightment. As Blackburn J. said in *Ireland* v. *Livingston* (2), "Should the goods not be delivered in consequence of a peril of the sea, he is not called on to pay the freight, and he will recover the amount of his interest in the goods under the policy. If the non-delivery is in consequence of some misconduct on the part of the master or mariners, not covered by the policy, he will recover it from the shipowner." He therefore wants a policy and contract of affreightment covering the whole adventure. Supposing in this case the

(1) Unreported. See note on p. 107, post.
(2) L. R. 5 H. L. 395, at p. 407.

transhipment had been at Hamburg, would it have been enough to tender the bill of lading from Hamburg to London? If the transfer of the bill of lading from Manila to Hong Kong is necessary to enable the buyer to sue the shipowner, it should have been tendered; if being spent its indorsement will not have that effect, this is another argument in favour of the tender of one contract of affreightment for the whole voyage. On this point Mr. Bailhache suggested that, while it need not be tendered, the buyer might be entitled to claim its transfer afterwards; and he cited a sentence from the judgment of Kennedy L.J. in *Biddell Brothers* v. *E. Clemens Horst Co.* (1), where the Lord Justice said: "How is such a tender to be made of goods afloat under a c. i. f. contract? By tender of the bill of lading, accompanied in case the goods have been lost in transit by the policy of insurance." I shall not be supposed to be lacking in appreciation of a judgment which has been adopted by the House of Lords when I say that I am unable to follow this obiter dictum. At time of tender the goods are generally at sea, and nobody on land knows whether they are afloat or at the bottom, and in my view the buyer is entitled to require the policy in his shipping documents, whether it is known that there has been a loss or not.

In my view, therefore, the umpire was right on both the grounds argued before him, and his award must be confirmed. The buyers must have the costs of this hearing.

Award confirmed.

Solicitors for plaintiffs: *Waltons, Johnson, Bubb & Whatton.*
Solicitors for defendants: *Druces & Attlee.*

NOTE.

COX, MCEUEN & Co. *v.* MALCOLM & Co.

Coram Hamilton J.

July 1, 1910.

AWARD in the form of a special case stated by an arbitrator.

1.—(*a*) By a written and printed contract dated September 20, 1909, Cox, McEuen & Co. sold to Malcolm & Co. 500 bales of Manila hemp P. C. M. C.

(1) [1911] 1 K. B. 934, at p. 956.

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at the price of 27*l.* 10*s.* net per ton to be shipped from a recognized shipping port or ports in the Philippine Islands, or from Hong Kong, or Singapore, by steamer or steamers direct or indirect to London between August 1 and September 30, 1909, both inclusive.

(*b*) Declaration was to be made with due despatch not later than sixty days from bill of lading.

(*c*) Bills of lading were to be made out in sets of not exceeding 250 bales each.

(*d*) Payment was to be made by cash within twenty-four hours of vessel reporting at the Custom House in exchange for shipping documents.

(*e*) The contract contained a provision for arbitration under the Arbitration Act, 1889, with certain restrictions.

(*f*) There was also a supplementary clause providing that the date of the bill of lading attached to the shippers' draft should be conclusive evidence of the date of shipment.

There was appended to the special case a form of this contract from which it appeared that the price was to include cost, freight, and usual f. p. a. insurance.

2. On November 12, 1909, Cox, McEuen & Co. declared in writing to Malcolm & Co. in fulfilment of the above contract 500 bales of Manila hemp marked P. C. M. C. per *Yuensang* "as from Manila to Hong Kong and thence per steamer or steamers for London. Bill of lading dated September 30, 1909."

3. On November 24, 1909, Cox, McEuen & Co. wrote to Malcolm & Co.: "Referring to our declaration to you for 500 bales P. C. M. C. hemp per *Yuensang* s.s. against contract September 20, 1909, please note that the hemp has been transhipped at Hong Kong per *Glamorganshire*."

4. On December 7, 1909, Cox, McEuen & Co. presented to Malcolm & Co. for payment two invoices amounting to 1546*l.* 17*s.* 6*d.* for the goods.

5. The s.s. *Glamorganshire* arrived in London on December 16, 1909, with the goods on board.

6. The bills of lading representing the goods in London were two duly indorsed bills of lading each for 250 bales of hemp per s.s. *Glamorganshire* dated in Hong Kong October 23, 1909, and bearing the marginal note "Ex *Yuensang* from Manila." No draft was drawn in connection with these goods.

7. Malcolm & Co. refused to pay the invoices or to take up the bills of lading on the ground that the goods were not a valid tender under the contract because they had not been shipped to London direct or indirect between August 1 and September 30, 1909. They further contended that the date of the Hong Kong bills of lading was conclusive as fixing October 23, 1909, as the date of actual shipment of the goods.

8. The present arbitration then took place, in which Cox, McEuen & Co. claimed that Malcolm & Co. should pay the amount of the invoices and all charges, expenses, and interest incurred or lost by reason of the refusal of Malcolm & Co. to pay in cash within twenty-four hours after the arrival of the steamer.

Malcolm & Co. gave notice in writing to the arbitrator that in the event of his finding that the 500 bales shipped from Hong Kong on bills of lading

dated October 23 were a valid tender under the contract for August/September shipment, they required him when making his award to state a case for the consideration of the High Court of Justice.

9. The goods were in fact shipped by McLeod & Co. at the port of Manila in the Philippine Islands on September 30, 1909, on board the s.s. *Yuensang*, to be delivered unto shippers' order at Hong Kong. They were included in a bill of lading dated in Manila September 30, 1909, for 2400 bales of hemp of various marks. There were only 500 bales of Manila hemp of the mark P. C. M. C. included in this bill of lading.

10. The goods were in fact so shipped for the purpose of being transhipped in Hong Kong for delivery in London in fulfilment of a contract dated August 11, 1909, for the sale by McLeod & Co. to Cox, McEuen & Co. of 500 bales of Manila hemp P. C. M. C. to be shipped between August 1 and September 30, 1909, on the same terms as those contained in clause 1 of the contract in question.

11. The goods were transhipped in Hong Kong from the s.s. *Yuensang* to the s.s. *Glamorganshire*, bound for London, and the date of shipment on the s.s. *Glamorganshire* in Hong Kong was October 23, 1909.

12. McLeod & Co. in London on November 11, 1909, in writing declared the goods to Cox, McEuen & Co. in fulfilment of their contract as per *Yuensang* from Manila for London to Hong Kong to be transhipped thence per steamer or steamers at earliest opportunity.

The arbitrator found as follows:—

"13. It is usual that hemp from the Philippine Islands destined for London should be transhipped at Hong Kong.

"14. It is usual, but not in my opinion essential, that such hemp should be shipped from the Philippine Islands on through bills of lading."

The arbitrator awarded that Cox, McEuen & Co. had fulfilled their contract and that the goods were a valid tender thereunder, and that Malcolm & Co. should pay the amount of the invoices and other charges and costs mentioned in the award.

Horridge, K.C., and *Bremner*, for Cox, McEuen & Co.
Bailhache, K.C., and *Leck*, for Malcolm & Co.

July 1, 1910. HAMILTON J. This is an award stated in the form of a special case. The arbitrator has awarded in favour of Cox, McEuen & Co., the sellers, subject to the opinion of this Court on the question raised by Malcolm & Co., the buyers, as stated in paragraph 7 of the case. When bills of lading for the hemp, the subject-matter of the contract, were presented to Malcolm & Co., they refused to pay upon the ground that the hemp had not been shipped to London directly or indirectly between August 1 and September 30, 1909, and that the date of the Hong Kong bills of lading was conclusive as fixing October 23, 1909, as the date of actual shipment of the goods. Thereupon the parties went to arbitration, the sellers claiming payment and the buyers resisting payment upon this ground. The case therefore involves the following questions: First, whether the hemp covered by the bills of lading in question had been shipped to

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London direct or indirect at all; secondly, whether it had been shipped to London direct or indirect between August 1 and September 30, 1909; and thirdly, though this is another form of the second question, whether the date of the Hong Kong bills of lading conclusively proves that the goods were not shipped to London directly or indirectly between those two dates, but only at the latter date, October 23, 1909.

Clause 1 of the contract provides that shipment is "to be made from a recognized shipping port or ports in the Philippine Islands or from Hong Kong or Singapore by steamer or steamers direct or indirect to London between August 1, 1909, and September 30, 1909, both inclusive." Standing by itself that raises a pure question of fact, and, if the facts are to be gone into, the arbitrator has disposed of them by finding that the goods were shipped at the port of Manila, being a recognized shipping port in the Philippine Islands, on September 30 on board the *Yuensang* to be delivered to shippers' order at Hong Kong under a bill of lading dated in Manila September 30, 1909; that they were so shipped for the purpose of being transhipped in Hong Kong for delivery in fulfilment of another contract; that they were in fact transhipped in Hong Kong from the *Yuensang* to the *Glamorganshire*, bound for London; and that the date of the shipment on the *Glamorganshire* was October 23, 1909.

It was argued that the shipment at Manila was not a shipment direct to London, because the goods were in fact shipped to Hong Kong; and that it was not a shipment indirect to London, because the carrier's obligation under the bill of lading would be discharged if he delivered the goods to the shippers' order at Hong Kong without reference to any further transport to London. It was also suggested that, Hong Kong itself being one of the original shipping ports, the Hong Kong bills of lading are the only bills of lading with which the buyers in this case need concern themselves.

In my opinion the contract does not require, in order that a shipment may be made from Manila indirect to London, that there shall be a through bill of lading, or a bill of lading stating on its face that the shipment to the intermediate port is for the purpose of transhipment by the carrier to a London steamer. The goods were shipped indirect to London when the person entitled to the control of them, namely, the shipper and holder of the bill of lading, intended, when he shipped them at Manila, to tranship them at Hong Kong for delivery in London and in fact carried out that intention, which is the case here. There may be very good reasons for preferring that the bill of lading should be a through bill of lading, and that the Manila bill of lading should state that the goods were to be transhipped, and so preclude the shipper from having any opportunity of taking delivery of the goods at Hong Kong and diverting or detaining them, but if that is desired it must be the subject of express stipulation. In my opinion, upon the true construction of clause 1 of this contract, as set out in paragraph 1 (*a*) of the special case, the facts found by the arbitrator entitled the sellers to say that they have performed their obligation under it.

But the buyers contend that by the clause of the contract which is set out in paragraph 1 (*f*) of the special case this is not a matter of evidence at all, but that the date of the Hong Kong bills of lading is as between the parties conclusive of the date of shipment. That clause provides that the

date of the bill of lading attached to the shippers' draft shall be conclusive evidence of the date of shipment. What the clause means is not clear. Payment as between the parties is not to be by draft at all, but by cash within twenty-four hours of the vessel reporting, or at an earlier date than that if a draft drawn in Manila upon the sellers matures before the arrival of the vessel. If this is the draft referred to in paragraph 1 (*f*) of the special case, the bill of lading referred to would be the Manila bill of lading which bears a date fatal to the contention of the buyers; if the draft referred to is a draft by the sellers upon the buyers, it is sufficient to say that no such draft was ever drawn. However, the buyers contended that the bill of lading the date of which is made conclusive must be the Hong Kong bills of lading because Hong Kong is itself one of the original ports of shipment named in the contract and because the Manila bill of lading could not be tendered as one of the shipping documents in that it violated the clause in paragraph 1 (*c*) of the special case providing that bills of lading were to be made out in sets of not exceeding 250 bales each. In my view the question whether Hong Kong was a port of original shipment or a port of transhipment is a question of fact; it might be the one or the other according to the facts. As to whether the Manila bill of lading could be tendered as one of the shipping documents, that is not among the questions raised in this special case. Having regard to the fact that it was a bill of lading for 2400 bales, I do not think it was one which the buyers were bound to accept. But that is not the question. In order to prevail, the objection to this bill of lading must go not to its standing as one of the shipping documents in this case, but to its admissibility as evidence of the date of shipment, and in that respect it is none the worse because it could not be tendered as one of the shipping documents which the buyers were to receive in exchange for payment. This point therefore does not arise in connection with the contentions raised by the buyers, and, as a separate ground for claiming to reject, it is not open to them under the form of question submitted in this special case. The questions therefore must be answered in favour of the sellers. The result is that the award stands for payment by Malcolm & Co. to Cox, McEuen & Co. of 1546*l.* 17*s.* 6*d.* and other sums including the costs of the award.

Solicitors for plaintiffs: *Ashurst, Morris & Crisp.*
Solicitors for defendants: *Waltons, Johnson, Bubb & Whatton.*

W. H. G.

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March 6, 7, 11.

CANTIERE MECCANICO BRINDISINO v. JANSON.

Insurance (Marine)—Concealment—Floating Dock—"Seaworthiness admitted."

The owners of a floating dock insured it against loss on a voyage by sea, the policy containing the words "seaworthiness admitted." The dock was in sound condition as a dock, but in order to make it seaworthy for a voyage it required specially strengthening. It was not in fact so strengthened, the owners believing that such strengthening was unnecessary and that it was capable of being safely towed to its destination without it :—

Held, that the underwriters, who knew that the subject-matter of the insurance was a floating dock and therefore not an ordinary sea-going vessel, were by reason of the admission of seaworthiness put on inquiry as to its construction, and that the owners were not bound to disclose the want of special strengthening.

Trial of action before Scrutton J. without a jury.

The action was brought on certain policies of marine insurance on a floating dock in tow of two tugs from Avonmouth to Brindisi. The policies, which insured the dock against all the usual perils, contained the words "seaworthiness admitted." While being towed on the voyage to Brindisi the dock was totally lost in the Bay of Biscay. The defendant underwriters defended the action upon the ground amongst others that they had been induced to subscribe the policies by reason of the concealment of a material fact, namely, that the dock was being sent on the voyage without the additional strengthening usual and necessary for the despatch of a dock on an ocean voyage. The following statement of the facts is taken from the judgment of the judge:—The dock in question was built of iron in the north by Messrs. Stephenson in 1893 for the use of the Bristol Corporation. It consisted of six pontoons side by side, one foot apart, but joined at the top only by riveted plating. Across the six pontoons on each side was erected a wall, partly open with diagonals, partly a hollow iron structure with a deck on top, the whole secured by angle irons and bolts to the pontoons. Its original cost was between 40,000*l.* and 50,000*l.* For some reason, probably because it was too large for the dock entrance at Avonmouth, it had not been erected in the north and towed round to Bristol as a whole, but

the pontoons were towed round separately into the dock at Bristol, and there the whole structure was put together. It had consequently not been prepared for a sea voyage in the usual way. It remained, doing work for the Bristol Corporation, and well kept up by them till 1908, when their new dry dock was approaching completion. It was then found that work estimated at about 2800*l.* was necessary for its upkeep, and the Bristol Corporation determined to sell it as it was. A Mr. Constant of London bought it in 1911 for 5000*l.*, the low price being partly due to the fact that it had to be taken to pieces to get it out of the dock. He negotiated for its sale first to Argentina, then to Turkey. Ultimately on August 30 he sold it to the plaintiff firm for 19,000*l.*, which price included cost of towing from Avonmouth to Brindisi, cost of insurance, and all fittings, strengthening and towing gear, ropes, &c., necessary for the voyage. The contract of sale also provided that "Before the dock leaves vendors agree to hand purchasers Lloyd's policies of insurance for 16,500*l.* This insurance will be duly indorsed over to them and they shall receive the full benefit of such policy." On July 11 Mr. Constant employed one Fletcher, a competent ship repairer, to get the floating dock out of the Avonmouth basin. Fletcher accordingly unbolted the pontoons and walls, took them out of the basin, and rebolted them with some 20,000 new bolts. This undoubtedly made the dock a stronger structure than it was before. A general overhaul took place, and Mr. Constant spent over 2000*l.* on this reconstruction and overhaul, a substantial portion of which was occasioned by expenses caused by the sinking of one of the pontoons. No other preparation was made for the voyage, as Mr. Constant and Mr. Fletcher honestly thought that no preparation was necessary, the dock being in first-class condition and rebolted throughout. They were confirmed in this opinion by the report of Mr. Watkins, a surveyor who frequently acted in insurance matters, who reported on August 24 that she might safely be towed to a Mediterranean port provided that suitable arrangements for towing were made, and by the action of the tug owners, who, after inspection and provision of certain bollards, undertook to tow her to Brindisi on the terms that they should be paid nothing unless they delivered her there. After some

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delay she started in tow of two tugs from Avonmouth on September 13, and was lost in the northern part of the Bay of Biscay on September 16, the wind at that time being recorded at Ushant and the Longships light as of force 5. The dock sank in two pieces, the wall and pontoons having parted amidships. Upon the question of the concealment by the assured of a material fact the judge found the following facts. The dock was not at the time of sailing as fit for the voyage as was usual and proper for such an adventure or as she could have been made by ordinary available means. In other words it was not seaworthy according to the test indicated in the judgments in *Burges* v. *Wickham* (1) and *Turnbull* v. *Janson*. (2) In order to strengthen the dock for sea the pontoons should have been joined at the bottom, the diagonals should have been strengthened in their attachments, and the top deck of the side walls should have been strengthened. The strengthening would have cost between 4000*l*. and 5000*l*. Without it the dock was not strong enough to stand the probable strain of a sea way. The dock had not been strengthened for the voyage in the sense in which that term would ordinarily be understood. Her reconstruction with new bolts after taking her out of dock had strengthened her, but this was not done for the voyage and would not be ordinarily understood as strengthening for the voyage, though it was very relevant in considering her efficiency as a dock. The fact that the dock had not been strengthened for the voyage was clearly material to the question whether and at what premium the underwriters should insure her. If they had been told it they would either have refused the risk or made further inquiries as to her construction. Neither Mr. Constant nor the plaintiffs nor any servant or agent of theirs whose duty it was to inform them knew or believed that the dock was not seaworthy in the sense above indicated. They all thought she was fit for the voyage. They knew that she had not at this time been specially strengthened for the voyage except in so far as the new bolts were strengthening, but honestly thought it unnecessary. They did not know that she had not, when built, been strengthened for a

(1) (1863) 3 B. & S. 669, at p. 696. (2) (1877) 36 L. T. 635.

sea voyage round to Avonmouth, and had not in fact made such a voyage as a dock.

Atkin, K.C., *Holman Gregory, K.C.*, and *R. A. Wright*, for the defendants. It was a matter of importance to the underwriters that, inasmuch as seaworthiness was admitted by the policy, the fact that the dock had not been specially strengthened for the voyage should be disclosed to them, for they would not have underwritten the risk if they had known of it. By s. 18 of the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), "The assured must disclose to the insurer before the contract is concluded every material circumstance which is known to the assured." Constant knew that the dock had not been specially strengthened for the voyage.

Bailhache, K.C., and *F. D. Mackinnon*, for the plaintiffs. The obligation in s. 18 is subject to the provisions of the section, one of which is that the assured need not disclose "any circumstance as to which information is waived by the insurer." As the absence of strengthening would render the dock unseaworthy, and as the underwriters must have known that that would be the result, they ought to have inquired whether it had been specially strengthened or not. Not having done so they must be taken to have waived the information.

Cur. adv. vult.

March 11. SCRUTTON J., after stating the facts as above set out, proceeded as follows: On these findings the question arises, What is the extent of disclosure necessary by an assured who asks an underwriter to insure "seaworthiness admitted" a subject-matter such as a river steamer, or floating dock, which can never be seaworthy in the ordinary sense of the term, for it is not intended for sea work, but which can have additional temporary strengthening for a voyage built into it or added to it? There can be no doubt that if the assured knows of any specific defect, such as a leak or badly corroded plates, he must disclose it in asking for an insurance "seaworthiness admitted." So also if the assured knows or believes that the dock is not fit to go to sea owing to the absence of some strengthening usually added,

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Scrutton J.

or has a report or opinion to that effect, though he thinks it erroneous, he must, in my opinion, disclose his knowledge or his unfavourable report. But suppose none of these facts exist, but the assured and his servants honestly believe the dock is strong enough to go to sea, and tell the underwriters she is a "floating dock" (in this case one of some age), must they disclose anything else? If the policy did not admit seaworthiness they need not disclose anything, for the implied warranty excludes the necessity of disclosure of facts which would break it: Marine Insurance Act, s. 18, sub-s. 3 (*d*). But if the warranty is excluded by the words "seaworthiness admitted," must they give the underwriter without his asking for it a full statement of the construction of the structure which they have informed him is a floating dock?; or when they tell the underwriter it is a floating dock and therefore not an ordinary seagoing vessel, and ask him to admit its seaworthiness, do they put him on inquiry as to its construction and the means adopted to send it to sea, with the result that if he does not ask he waives information? Lord Mansfield in *Carter* v. *Boehm* (1) took this view of the insurance of a privateer, so described, which the underwriter must know by its description was engaged on secret enterprises, of which, if he did not ask about them, he waived disclosure. He said: "If an underwriter insures private ships of war, by sea and on shore, from ports to ports, and places to places, anywhere—he needs not be told the secret enterprises they are destined upon; because he knows some expedition must be in view; and from the nature of his contract, without being told, he waives the information." The House of Lords in *Seaton* v. *Burnand* (2) had a case where the solvency of a surety for a loan was insured, and it was urged by the underwriters that it was material to disclose that the loan was at an interest of over 30 per cent. One of the reasons given by the members of the House was that by Lord Shand. At p. 147 he said: "I must further add that I am of opinion, as Mr. Joseph Walton very forcibly put it, there was enough to put members of Lloyd's on inquiry. It was for them to inquire if they thought further information was required. The very circumstance that a guarantee of Sir Frederick Seager

(1) (1766) 3 Burr. 1905, at pp. 1910, 1911. (2) [1900] A. C. 135.

Hunt's obligation was asked for indicated that at all events security, which was ample and substantial, was required, and that circumstance was sufficient to put them upon inquiry—such inquiry as they made by going to the manager of the bank, from whom they ascertained what Sir Frederick Seager Hunt's circumstances were." Other cases are collected in s. 618 of the last edition of Arnould's Marine Insurance.

The clause " seaworthiness admitted " is put into these insurances of floating docks and river steamers not ordinarily engaged in sea voyages to avoid the doubtful and difficult inquiry whether sufficient temporary strengthening for an unusual service has been applied to a subject-matter not originally intended for that service; and in my view the proposal of such an insurance to an underwriter, while requiring the disclosures I have already suggested, puts him on inquiry as to the actual construction, and strengthening if any, of the subject-matter if he wants to investigate it. The defence of concealment in my view therefore fails.

Judgment for plaintiffs.

Solicitors for plaintiffs: *W. A. Crump & Son.*
Solicitors for defendants: *Parker, Garrett & Co.*

J. F. C.

C. A.
1912
March 12.

[IN THE COURT OF APPEAL.]

IVEY *v.* IVEY.

Employer and Workman — Death — Compensation — Dependants — Award — Apportionment — Change of Circumstances — Death of Widow — Variation of Award — Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I.* (9.) (1)—*Workmen's Compensation Rules*, 1907—1911, *r.* 58.

A workman having met with a fatal accident, the arbitrators under the Workmen's Compensation Act, 1906, awarded 292*l.* 1*s.* 7*d.* compensation to his dependants, his widow and four younger children, in certain proportions, of which the widow was to receive 102*l.* 1*s.* 7*d.* The money was ordered to be paid to trustees and fortnightly payments were made to the widow. She died intestate leaving 72*l.* 18*s.* 2*d.* in the hands of the trustees representing the unexhausted part of her share of the compensation. Her next of kin claimed the money on the ground that it was vested in her and undisposed of. Two of the dependent children applied to the arbitrators for an order under Sched. I., paragraph 9, of the Act for the variation of the award and an order that the 72*l.* 18*s.* 2*d.* should be apportioned between them:—

Held, that the circumstances of the applicants had been varied by the death of the widow; that paragraph 9 applied to cases where a dependant had died; and that the arbitrators had power to vary the award.

Appeal from an award of the judge of the Consett County Court, sitting as arbitrator under the Workmen's Compensation Act, 1906, by which he held that there was no power to vary the apportionment of compensation payable to the dependants of a deceased workman which had been awarded by the committee representative of the Durham colliery owners and the Durham miners' associations.

By an Order made by the Secretary of State on June 25, 1907, under paragraph 16 of Sched. II. of the Act of 1906, certain powers

(1) "(9.) Where, on application being made in accordance with rules of Court, it appears to a county court that, on account of neglect of children on the part of a widow, or on account of the variation of the circumstances of the various dependants, or for any other sufficient cause, an order of the Court or an award as to the apportionment amongst the several dependants of any sum paid as compensation, or as to the manner in which any sum payable to any such dependant is to be invested, applied, or otherwise dealt with, ought to be varied, the Court may make such order for the variation of the former order or the award, as in the circumstances of the case the Court may think just."

were conferred on the committee, and under these they stated a special case for the purpose of obtaining the decision of the county court judge upon a question of law arising in an arbitration. The special case was as follows:—

"1. John Ivey was employed as a hewer at West Stanley Colliery in the county of Durham at an average weekly wage of 1*l.* 12*s.* 5*d.* with free house and coals and was killed by accident arising out of and in the course of his employment on the 16th of February, 1909. He left a widow, Catherine Ivey, and eight children, namely, John Henry Ivey aged 32, William Ivey aged 30, Thomas Ivey aged 24, Rosina Ovington aged 20, Mary Jane Ivey aged 18, Lily Ivey aged 15, Ethel Ivey aged 13, and Hilda Ivey aged 9.

"2. By an award dated the 19th of April, 1909, we declared that the owners of West Stanley Colliery were liable to pay the sum of 292*l.* 1*s.* 7*d.* as compensation for the injury resulting to the dependants of the said John Ivey and that the persons hereinafter named were entitled to share in such compensation as such dependants in the shares and proportions following, that is to say:—

102*l.* 1*s.* 7*d.* for the benefit of Catherine Ivey.
20*l.* to or for the benefit of Mary Jane Ivey.
40*l.* to or for the benefit of Lily Ivey.
50*l.* to or for the benefit of Ethel Ivey.
80*l.* to or for the benefit of Hilda Ivey.

"3. We ordered that the said sum of 292*l.* 1*s.* 7*d.* should be paid to trustees and that the sum of 1*l.* 10*s.* should until otherwise ordered be paid fortnightly by the trustees to the said Catherine Ivey for the maintenance of the said dependants, such sum to be made up out of the shares of the said dependants in the amounts following, namely:—

10*s.* out of the share of Catherine Ivey.
5*s.* out of the share of Mary Jane Ivey.
5*s.* out of the share of Lily Ivey.
5*s.* out of the share of Ethel Ivey.
5*s.* out of the share of Hilda Ivey.

"4. The deceased left other children, viz.: John Henry Ivey, William Ivey, Thomas Ivey and Rosina Ovington, and we found

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as a fact that none of these last mentioned children were dependent upon the earnings of the said deceased and we did not apportion any share in such compensation to them or any of them.

"5. The said Mary Jane Ivey has since intermarried with William Northey of West Stanley aforesaid, miner, and Lily Ivey has since intermarried with John Liddell of West Stanley aforesaid, miner.

"6. The said Catherine Ivey died intestate on the 2nd of December, 1910, and there was then remaining in the hands of the said trustees out of her share in such compensation the sum of 72*l.* 18*s.* 2*d.*

"7. Letters of administration of the estate of the said Catherine Ivey were granted on the 6th day of April, 1911, by the Durham District Probate Registry of the High Court of Justice to the respondent John Ivey, the lawful son and one of the next of kin of the said intestate.

"8. At a meeting of the committee held on the 12th of June, 1911, the said Ethel Ivey and Hilda Ivey (the above-named applicants), after having given to the respondents due notice, as required by the Rules made under the provisions of the said Act, of their intention to make such application, applied to us for an order under Schedule I. section 9 of the said Act for the variation of our former award as to the apportionment of the said compensation amongst the several dependants of the said John Ivey, and asked that under such order the said sum of 72*l.* 18*s.* 2*d.*, being the unexhausted balance of the share of the said Catherine Ivey in such compensation, should be apportioned amongst them or such of them as we should think fit as such dependants as aforesaid in such proportions as we should think fit.

"9. For the respondents it was submitted that we had no power to make such an order as was proposed on the ground that under clause 8 Schedule I. of the said Act each dependant is entitled to have his or her share ascertained and awarded, and that on any share being so ascertained and awarded to any dependant such share, subject to the provisions of clause 9 Schedule I. of the said Act, becomes legally vested in that dependant; that consequently on the death of the said Catherine Ivey the unpaid portion of

her share of compensation so awarded passed to the respondent John Henry Ivey as her legal personal representative as part of her estate for division amongst her next of kin and that the committee has no power to deal with the amount of such share after such death: and, moreover, that clause 9 Schedule I. of the said Act only applies where and after the circumstances of any living dependant have varied as therein mentioned and that the clause has no application to the share of a dependant after the death of such dependant.

"10. We are of opinion that it would be advantageous, if we have the power, that we should make an order in the terms asked for by the applicants, as thereby the benefit of the whole sum payable as compensation is retained solely for such of the dependants of the deceased as are now dependent upon the sum paid as compensation.

"11. The question of law therefore which we desire to submit for the opinion of the Court is whether the committee has power to make an order upon the terms or to the effect asked for by the applicants as set out in paragraph 8 of this special case."

The county court judge held that the committee had no power to vary the award; and the applicants appealed.

M. P. Griffith-Jones, for the appellants. By paragraph 5 of Sched. I. of the Act of 1906 the distribution of the compensation is within the discretion of the Court; and by the Order of June 25, 1907, by the Secretary of State under paragraph 16 of Sched. II. the committee represent the Court. Under paragraph 8 of Sched. I. the amount payable to each dependant is to be settled by the committee, and that is consistent with each dependant taking a vested interest in his share; but that is subject to Sched. I., paragraph 9, which authorizes the Court, and therefore the committee, to make an order for the variation of the award on account of the variation of the circumstances of the various dependants or for any other sufficient cause. That shews that the dependants' interests are not vested; and accordingly the committee have power to vary this award. The death of the widow has caused a variation in the circumstances of the

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children, and the balance of her share should be distributed amongst them.

W. Shakespeare, for the next of kin. The expression "circumstances" in paragraph 9 refers to the circumstances of dependants who are alive at the time and does not refer to the death of a dependant, though, no doubt, the language of the clause is wide enough to include it. The shares are vested and cannot be altered if any of the dependants die. Rules 8, 9, 15, 48 and 58 of the Rules of 1907—1911 provide for service of particulars of applications on all parties interested, and there is no provision for serving the legal personal representatives of any who are dead. The power to vary refers to living persons only; the widow's creditors could seize the balance of her share, but if she had become bankrupt, instead of dying, the award might have been varied.

No reply was called for.

COZENS-HARDY M.R. stated the facts and read paragraph 9 of Sched. I., and continued: What reason is there for cutting down the power conferred by that paragraph? It is said that the widow was absolutely entitled to this money, but could she have assigned it away from her children or paid it to a creditor? We should be frittering away entirely this beneficial provision for the dependants if we allowed any doubt to exist on this point. Mr. Shakespeare, who has argued this case with his usual fairness and ability, admitted that the language of the rule was wide enough to include the death of a dependant, but he says an award can only be varied whilst the dependants are alive and there is no provision for changes on death. Rule 58 says "an application for the variation of an order of the Court under paragraph 9 of the First Schedule to the Act may be made by any person interested." The contention of Mr. Shakespeare for the legal personal representative of the widow is that her next of kin are the persons interested within that rule; but some of them had no interest under the award. Then has there been any variation of the circumstances of the various dependants? Clearly there has; the thirty shillings a fortnight was to be paid to her for the maintenance of herself and her younger children. Now she is dead and the provision for maintenance is completely

changed. I cannot imagine clearer circumstances for justifying a variation of the award. In my opinion the committee have power to make the variation which they desire and give the unexhausted balance to the children. The appeal must be allowed.

FLETCHER MOULTON L.J. I agree.

BUCKLEY L.J. In my opinion the death of one dependant is a "variation of the circumstances of the various dependants." If one of two children had died after apportionment there would have been left a widow and one child instead of a widow and two children. In such case a variation of the apportionment might be just. Similarly when the widow died there would be only two children left. I should have thought that the death of the widow was a sufficient variation of her own circumstances to satisfy paragraph 9, but, however that may be, it is certainly a sufficient variation of the circumstances of the children, or of herself and the children.

Appeal allowed.

Solicitors: *Hyman Isaacs & Lewis, for Isaacs & Heath, Sunderland; King, Wigg, Robertson & Brightman, for Nicholson & Martin, Newcastle-upon-Tyne.*

H. C. R.

C. A.
1912
March 16.

[IN THE COURT OF APPEAL.]

MALLINDER *v.* J. MOORES & SONS, LIMITED.

Employer and Workman—Compensation—Industrial Disease—Gradual Process —Former Employer—Contribution—Workmen's Compensation Act, 1906, (6 *Edw.* 7, *c.* 58), *s.* 8, *sub-s.* 1 (*c*) (iii.).

The claimant, a workman in the employment of the defendants, applied to the county court judge to settle the compensation to which he was entitled under the Workmen's Compensation Act, 1906, in respect of mercurial poisoning alleged to have been contracted by him whilst in the service of the defendants. The defendants disputed their liability and also served a third party notice for contribution under s. 8, sub-s. 1 (*c*) (iii.), on previous employers of the claimant by whom he had been employed within the twelve months previous to the date of his disablement. The judge awarded compensation and dismissed the third party notice on the ground that the defendants had failed to prove that the claimant's disease was in fact contracted whilst he was in the service of the previous employers :—

Held, that this was an application for contribution under s. 8, sub-s. 1 (*c*) (iii.), not an application under s. 8, sub-s. 1 (*c*) (ii.) to join another employer as defendant, and that there was no obligation on the appellants to prove that the disease was contracted whilst the claimant was in the service of the previous employers.

Appeal from an award of the judge of the Cheshire, Hyde, County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

On April 7, 1911, the certifying surgeon for Denton certified that the applicant Sam Mallinder was suffering from mercurial poisoning, which is one of the industrial diseases included in s. 8 of the Workmen's Compensation Act, 1906 (1), and was

(1) Sect. 8 : "(1.) Where—

"(i.) the certifying surgeon appointed under the Factory and Workshop Act, 1901, for the district in which a workman is employed certifies that the workman is suffering from a disease mentioned in the Third Schedule to this Act and is thereby disabled from earning full wages at the work at which he was employed; or

"(ii.) a workman is, in pursuance of any special rules or regulations made under the Factory and Workshop Act, 1901, suspended from his usual employment on account of having contracted any such disease; . . . .

and the disease is due to the nature

thereby disabled from earning full wages at his work as a felt hat body maker. At that time Mallinder was in the employment of J. Moores & Sons, hat manufacturers, Denton. In the course of his work he had to handle hat bodies made from fur which had been prepared by a process called "carotting," involving the use of a solution of nitrate of mercury. The result was that he absorbed mercury into his system and had to cease work on March 30, 1911, suffering from a peculiar form of shaking palsy known as "the trembles." Immediately prior to his employment with J. Moores & Sons and within the twelve months preceding the certificate Mallinder had been in the service of J. Woolfenden & Sons, hat manufacturers, and before that with Booth & Moores, also hat manufacturers. Mallinder applied to the county court judge to settle the compensation payable by J. Moores & Sons. They disputed their liability on the ground that the disease was not contracted in their service, and they also served third party notices on J. Woolfenden & Sons and Booth & Moores, claiming contribution from them in

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of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement or suspension, whether under one or more employers, he . . . . shall be entitled to compensation under this Act as if the disease or such suspension as aforesaid were a personal injury by accident arising out of and in the course of that employment, subject to the following modifications:—

"(c) The compensation shall be recoverable from the employer who last employed the workman during the said twelve months in the employment to the nature of which the disease was due:

"Provided that—

"(ii.) if that employer alleges that the disease was in fact contracted whilst the workman was in the employment of some other employer, and not whilst in his employment, he may join such other employer as a party to the arbitration, and if the allegation is proved that other employer shall be the employer from whom the compensation is to be recoverable; and

"(iii.) if the disease is of such a nature as to be contracted by a gradual process, any other employers, who during the said twelve months employed the workman in the employment to the nature of which the disease was due, shall be liable to make to the employer from whom compensation is recoverable such contributions as, in default of agreement, may be determined in the arbitration under this Act for settling the amount of the compensation;"

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respect of the compensation claimed from them, on the ground that the disease was of such a nature as to be contracted by a gradual process and that Mallinder had been employed by them within twelve months of his disablement. They did not allege that the disease had been actually contracted at any particular date. The county court judge made an award in favour of the applicant for compensation and dismissed both the third party notices "on the ground that the respondents failed to prove their allegation that the applicant's disease was in fact contracted whilst he was in the employment of either of these employers." J. Moores & Sons appealed against so much of the award as dismissed their notice to Messrs. Booth & Moores on the ground that the judge had taken a wrong view of the law in holding that they were not entitled to contribution inasmuch as they had not proved that the applicant's disease was in fact contracted whilst he was in the employment of Booth & Moores. They did not appeal in respect of J. Woolfenden & Sons because there was no evidence that they used mercury in their business.

W. Shakespeare, for the appellants. The learned judge has applied s. 8, sub-s. 1 (*c*) (ii.), to this case instead of s. 8, sub-s. 1 (*c*) (iii.), and r. 39 (5.) of 1907—1911, under which the notice was given. There was no reason why the appellants should prove that the disease was in fact contracted whilst Mallinder was in the employment of the previous employers.

[He was stopped by the Court.]

Douglas Knocker, for the respondents. There was no evidence that the business of the respondents was one in which the disease could have been contracted or that Mallinder was employed by the respondents within the time limited. The appellants might have proceeded under s. 8, sub-s. 1 (*c*) (ii.), and it is true that the learned judge has used the wrong words, but practically he has decided the relevant point in holding that the respondents are not liable to contribute.

No reply was called for.

COZENS-HARDY M.R. I think the learned judge has made a slip in this arbitration. This is a case of gradual disease—

mercurial poisoning—caused by the use of salts of mercury in dealing with felt hats. The evidence is conclusive that the workman was suffering from that disease. He was in the employment, when the disability became manifest, of Messrs. J. Moores & Sons, and they have been held liable to the workman on the ground that this was an industrial disease which, for some purposes, amounts to an accident. That part of the award is not appealed against because Messrs. J. Moores & Sons now admit that they are liable. They do not raise the point that the disease was not contracted while in their employment but in that of somebody else; they claim contribution from other employers in whose service Mallinder had been within twelve months of his disablement, and they proceed simply and solely by s. 8, sub-s. 1 (*c*) (iii.). It is proved that Messrs. Booth & Moores were carrying on a business of such a nature as that to which the disease was probably due; in fact the business was similar to that of Messrs. J. Moores & Sons. Mallinder was employed by Messrs. J. Moores & Sons for a considerable time during the last twelve months before the injury developed itself.

The question is, what is the meaning of s. 8, sub-s. 1 (*c*) (iii.): "if the disease is of such a nature as to be contracted by a gradual process, any other employers, who during the said twelve months employed the workman in the employment to the nature of which the disease was due, shall be liable to make to the employer from whom compensation is recoverable such contributions as, in default of agreement, may be determined in the arbitration under this Act for settling the amount of the compensation"? Now, the learned judge in his judgment, which very carefully deals with the question as between Booth & Moores and J. Moores & Sons, says this: "As regards the two notices of claim for 'contribution' under s. 8, sub-s. 1 (*c*) (iii.), served by the respondents on Messrs. Booth & Moores and on Messrs. Woolfenden I dismiss both of them with costs on scale B in each case; on the ground that respondents failed to 'prove' their allegation that the applicant's disease 'was in fact contracted whilst he was in the employment of either of these employers.'" The learned county court judge, with great respect, has confused clauses (ii.) and (iii.), which are addressed to an entirely different state of circumstances.

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Clause (ii.) is addressed to this: immediately the employer knows of the accident he says "I am not liable at all; it has not been contracted while in my employment and you must go against my predecessor as employer, whom I make respondent to this application, in order to have the issue decided."

Clause (iii.) is not a provision to enable the last employer to obtain relief from the liability to the workman; it is something entirely different. In the case of a disease contracted by a gradual process the last employer shall be liable, but any other employer whose business is of the same nature in whose employment the workman has been within the last twelve months shall give such contribution as may be determined by the arbitrator. We are not saying in the least what the amount of the contribution shall be; that is for the judge; but I think he has misconstrued the section when he says the third party notice must fail on the ground that it was for J. Moores & Sons to prove affirmatively that the disease was contracted while Mallinder was with Booth & Moores.

I will only say a few words with regard to J. Woolfenden & Sons. It was proved that the business which J. Woolfenden & Sons were carrying on, so far as this workman was concerned, was not of the same nature as that carried on by J. Moores & Sons and Booth & Moores; their discharge was quite right, and this appeal only deals with Booth & Moores, who are engaged in a business of the same nature as J. Moores & Sons.

In my opinion this appeal must be allowed.

FLETCHER MOULTON L.J. I am of the same opinion. I think this case presents a typical example of the circumstances to which the provisions of s. 8, sub-s. 1 (*c*) (iii.), are addressed. The disease here is undoubtedly of such a nature as to be contracted by a gradual process. It is also clear that there is another employer, Messrs. Booth & Moores, who, during the twelve months before the disablement, employed the workman in an employment calculated to give this disease; and it is proved that Messrs. J. Moores & Sons employed the applicant in an employment of the same character as that of Messrs. Booth & Moores.

The respondents J. Moores & Sons have been defeated in the arbitration and they accept their defeat. They admit that they were employing Mallinder in an employment which was of a character to give this disease; but they say Messrs. Booth & Moores, within the twelve months referred to in this sub-section, also employed him in similar employment, and they contend that they are entitled to an arbitration to fix the amount that Messrs. Booth & Moores should pay as their share of the compensation.

The learned county court judge has said that they have failed to prove that the disease was contracted while the man was in the employment of Messrs. Booth & Moores. The answer is, they are entitled to an arbitration whether they prove that or not. In fact it is quite clear that that issue is not an issue under s. 8, sub-s. 1 (*c*) (iii.), at all. This case must go back in order that Messrs. J. Moores & Sons, Limited, may have the arbitration given to them by s. 8, sub-s. 1 (*c*) (iii.), against Messrs. Booth & Moores, who, within twelve months, also employed the applicant in an employment calculated to give this disease.

BUCKLEY L.J. There has been a confusion between two things which are distinct. Sect. 8 is a case in which there has been no accident. It provides that when the workman has become disabled or suspended by reason of such a disease as is mentioned in that section, the disablement or suspension is to be treated as if it were an accident, and the person liable to compensate is not necessarily the employer in whose employment he was when that hypothetical accident happened. The person primarily liable is the employer who last employed the workman during the twelve months previous to the date of the disablement or suspension in the employment to the nature of which the disease was due. But two cases are then dealt with. The first is that dealt with by s. 8, sub-s. 1 (*c*) (ii.). That is the case in which the last employer says that the man had already contracted the disease when he came to him, and that the disease was in fact contracted whilst the workman was in the employment of some other employer and not whilst in his employ. His remedy then is to join that other person as a party, and in that case that other party, to the exclusion of the last employer, will be the person liable.

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The other case, which is distinct, is s. 8, sub-s. 1 (*c*) (iii.). That is a case which is confined to diseases which are contracted by a gradual process which may be within clause (ii.) but to which clause (ii.) is not confined. Clause (iii.) is confined to cases of that description, and this case is one of that sort. If the disease is one contracted by a gradual process, then any other employers who employed the man during the twelve months in the employment to the nature of which the disease is due, are liable to compensate the last employer, and how they are to compensate him is to be determined in the arbitration. Here the last employers, Messrs. J. Moores & Sons, said there was a previous employer, Booth & Moores, who employed this man during the twelve months in the employment to the nature of which the disease was due, and the judge ought to say whether or not there was to be contributed by them any and what part of the compensation. That is not what he has done. He says he dismisses the claim of the last employer to contribution from the previous employer on the ground that the last employer failed to prove that the applicant's disease was contracted whilst in the employment of Booth & Moores. The last employers did not say it was contracted there; it was not necessary to say so; they say it was contracted by a gradual process, partly in their employment it may be, and partly in Booth & Moores', and it has to be ascertained how much ought to be borne by them and how much by the latter. In other words, it seems to me that the county court judge has put to himself the wrong question. The words which are put in his judgment in inverted commas, and which he says the plaintiffs failed to prove, are taken from clause (ii.), which is not relevant, and are not found in clause (iii.), which is relevant. He was asking himself the wrong question. I think that stage of this arbitration was the right moment of time to determine the question. But he has not determined it. He has not asked himself the right question, and on those grounds I think the appeal must be allowed.

Appeal allowed.

Solicitors: *F. J. Berryman, for Vaudrey, Oppenheim & Mellor, Manchester; Pettitt & Valentine, for W. F. Chambers, Denton.*

H. C. R.

[IN THE COURT OF APPEAL.]

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1912
March 20.

POULTON *v.* KELSALL.

Employer and Workman—Compensation—Course of the Employment—Area of Employment—Special Agreement—Strike—Workmen's Compensation Act, 1906, (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A workman employed as a storekeeper in Manchester acted as carter for his employer at a time when the carters of Manchester were on strike, under a special contract by which the employer agreed to be responsible for any injury which he might sustain. He was on his way home from work and was passing through a market place about seven minutes' walk from his employer's premises, when he was attacked by strikers and seriously injured:—

Held, that the agreement while enlarging the liability of the employer could not bring within the operation of the Workmen's Compensation Act, 1906, an accident which was not in the course of the workman's employment, and that an award of compensation under the Act could not be maintained.

Appeal from an award of the judge of the Manchester County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

J. H. Poulton, the applicant, was employed by the respondent, W. Kelsall, a fruit salesman at Manchester, as a storekeeper at 24*s.* per week. In July, 1911, the carters of Manchester were on strike, and the respondent's manager asked the applicant to drive a lorry to the railway station and bring back some potatoes. The applicant objected on the ground of the risk of his being injured, but the manager said the employer would take all responsibility, and on those conditions he went. He had police protection, but stones were thrown at him and he was struck several times. The next day he did the same thing and was threatened by strikers, and at midday he was told to go home for a rest and return at midnight. He went through the market, which was about seven minutes' walk from Kelsall's premises, and was there attacked by strikers and kicked on the knee. An abscess formed under the knee necessitating a painful operation and he was still incapacitated. The respondent paid him 12*s.* a week till July 27.

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In September Poulton applied to the county court judge to settle the compensation payable by his employer under the Workmen's Compensation Act, 1906. The respondent denied liability on the ground that the injury (if any) was not caused by accident arising out of and in the course of his employment, nor by accident occurring on, in, or about the respondent's premises. The county court judge ordered the respondent to pay a weekly sum to the applicant and arrears.

The respondent appealed.

W. Ellis Hill, for the respondent. The accident happened to the applicant while he was on his way home for his own purposes. The market was a public place, a long way from his employer's premises, and it is well settled that in such circumstances the accident does not arise in the course of the employment: *Gilmour* v. *Dorman, Long & Co.* (1)

[He was stopped by the Court.]

A. Adair Roche, for the applicant. This was a peculiar contract. The employer agreed to take special risks, and that brought this accident within the course of the workman's employment. Without contending that employers and workmen can agree that any injury sustained by the workman shall be deemed to be an accident within the Act, it may be argued that an agreement may be made that the employment shall be deemed to continue during the whole time that the agreement is in force. The result of this contract was that the sphere of the employment was extended and when the applicant was in the market he was still in the course of his employment: *Leach* v. *Oakley Street & Co.* (2); *Cremins* v. *Guest, Keen & Nettlefolds.* (3) The effect of the contract was really to enlarge the area of the employment.

COZENS-HARDY M.R. This is an unfortunate case in which a workman during the carters' strike in Manchester was engaged on duties which involved him in considerable risk. His ordinary business was that of a storekeeper, but by a bargain made with his employers he was entitled to say he was employed as

(1) (1911) 4 B. W. C. C. 279. (2) [1911] 1 K. B. 523.
(3) [1908] 1 K. B. 469.

a carter. He undertook the work of a carter on the promise of the respondent to protect him during a carters' strike and to be responsible for any injury he might suffer. So far as I can see there is no doubt that is a perfectly good contract in respect of which the workman, by an action against his employer, might recover damages in the event of his sustaining injury during the carters' strike.

What happened was this. He went one day by his master's direction to a railway station under police protection and got back. Stones were thrown at him, but no material injury was suffered. On the next day, he had been a very long time at work, and at 12 o'clock his master told him he had better go home and he went. He walked home through the market place, which is about seven minutes' walk from his place of business; that is to say, between a quarter and half a mile. When in the market place he was brutally assaulted by some of the strikers. They had thrown stones at him the day before and now brutally assaulted him in a manner which has undoubtedly led to his suffering serious injury. The question for us to determine is, Was this an injury by accident arising in the course of and out of his employment? The only point which I propose to deal with is this: Did it arise in the course of his employment? I purposely avoid saying anything about whether it arose out of his employment. It is perfectly well established that a man is not within the protection of the Act when he is going from his master's place—from the factory or whatever it may be—to his home. But it is said by Mr. Roche, who has argued this case with great ingenuity and ability, that under this special contract his employment was practically continuous, the master admitting liability during the whole of the carters' strike. Let us consider what that argument involves. Suppose the carter had admittedly been discharged on the day previous to this, and had been assaulted by the strikers the next day, could it possibly have been said this arose in the course of the employment? Take a simpler case. He had no duties to discharge at all on a Sunday; but suppose the strikers seeing him in the streets on the Sunday had assaulted him, could it possibly be said on an application under the

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Workmen's Compensation Act that that was an injury by an accident arising in the course of the employment? In my opinion it plainly could not. It is quite immaterial to say that under the special bargain the master might be liable whether it was or was not in the course of the employment. As at present advised I think that is the effect of the contract. The master contracts, "I will be liable for an accident which happens to you during the strike, whether in the course of my employment or not." That may give rise to a good cause of action, but it does not enlarge the employment in this sense, that under the Workmen's Compensation Act the workman is entitled to say, "By contract between you and me you are liable for this injury, and therefore you are bound on an application under this Act to treat it as if it were in the course of the employment when in fact it was not." On that ground I think this appeal must succeed.

FLETCHER MOULTON L.J. I am of the same opinion. In this case the learned county court judge acting as an arbitrator under the Workmen's Compensation Act has made an award in favour of the workman. His jurisdiction only extends to giving compensation in case of accident arising out of and in the course of the workman's employment. Mr. Ellis Hill submits that here the accident did not arise in the course of the employment. It arose while the workman was passing through the public market place on his way home to dinner from his work, and was in the nature of an attack upon him by certain strikers. Now it is quite clear that while a man is going along the public streets away from his work to his home he is not, under ordinary circumstances, in the course of his employment. Mr. Roche, who argued this case extremely well, contends that the ordinary rule does not apply, because the master had promised to the workman to undertake all responsibility for injuries that might come to him by reason of his working during the continuance of the strike. That term did not alter the area of the employment in any way. It altered solely the terms of the employment—the remuneration given to the workman. He was not only to be a workman paid by wages, and having the ordinary rights of a workman under the Workmen's Compensation Act, but there was

a special undertaking by the master that he would compensate him for injury which arose from the strike. That liability which the master took upon himself was not in any way confined to the period when he was in the course of his employment. In my opinion it was intended by both parties to and did apply to injuries done to him whether he was in the employment at the moment or not; and under these circumstances the existence of such a term as to remuneration is quite irrelevant to the consideration as to whether this accident happened to him in the course of his employment. The applicant is, therefore, driven back to the ordinary rule, and, as I have already said, a man is not in the course of his employment when he is going along the streets to or from his work.

For these reasons I think the appeal must be allowed.

BUCKLEY L.J. The man was a storekeeper in Manchester. Under exceptional circumstances and during a carters' strike he accepted another duty, namely, to go for the time being as a carter and drive a railway lorry to and from the station to fetch goods. That was done under a special agreement. I will for the moment ignore the special agreement and suppose there had been none. Under the Act of Parliament he would have been able to render the employer liable for injury by accident arising out of and in the course of his employment. In that state of facts the period of time during which he left his employment at the dinner hour, when he was going home to his own house to get his dinner or for other purposes, would not be included in "in the course of his employment."

I add that there was a special agreement, and the special agreement was that, inasmuch as this was dangerous work during the carters' strike, his employer would protect him during the strike and compensate him for any injury he might suffer. That was a special agreement which enlarged the liability of the employer, but it did not alter the scope of the employment. If by reason of ill-will engendered by this strike during the course of his employment the man were injured, the employer, under the special bargain, would be liable even if the accident did not happen in the course of his employment. It seems to me that

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this injury, assuming it did arise out of his employment, did not arise in the course of it, because at the moment that these men set upon him and assaulted him he was not in his employment at all. He had left his employment and was going home.

For these reasons this appeal must be allowed.

Appeal allowed.

Solicitors: *Watson, Sons & Room, for Norton & Howe, Manchester; Maples, Teesdale & Co., for F. W. Watson, Manchester.*

H. C. R.

[IN THE COURT OF APPEAL.]

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March 20.

JOHN MOWLEM & CO. *v.* DUNNE.

Employer and Workman — Compensation—Award—Correction—Slip—Jurisdiction—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58)—*Workmen's Compensation Rules*, 1907—1911, *r.* 28 (1.), (2.). (1)

A county court judge has no power to alter his award after it has been signed and sealed unless there has been an accidental slip or omission within r. 28 (2.), of the Workmen's Compensation Rules, 1907—1911.

A workman having sustained personal injury by accident arising out of and in the course of his employment, an agreement for compensation by his employers was recorded. The employers having applied for the review, termination, or diminution of the weekly sum payable to the workman, the county court judge reduced the compensation and directed that the employers should pay the costs. After the Court rose he added a note that on further consideration he directed the award to be without costs, and his signature was placed after that note. In the award as drawn up no costs were awarded to either party. The workman applied that the award might be corrected under r. 28 (2.) of the Workmen's Compensation Rules, 1907—1911, by awarding costs to him, on the ground that the award as drawn up differed from that made by the judge at the hearing:—

Held, that the judge had power to alter his award until it was signed and sealed within r. 28 (1.), but not afterwards.

APPEAL from an award of the judge of the West London County Court sitting as an arbitrator under the Workmen's Compensation Act, 1906.

(1) "Rule 28. Award. Form 24. (1.) The award of the judge on any arbitration shall be prepared and settled by the registrar, and shall be

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On March 20, 1911, John Dunne, whilst in the employment of John Mowlem & Co., met with an accident by which his eye was injured. An agreement was entered into between him and his employers whereby the latter admitted liability under the Act and agreed to pay to him compensation at the rate of 20*s.* a week; and a memorandum to that effect was recorded by the registrar. On October 14, 1911, an application was filed by John Mowlem & Co. requesting an arbitration with respect to the review, termination, or diminution of the weekly payment payable to Dunne under the agreement. On November 27, 1911, at the hearing of the application, after hearing evidence on both sides, the learned judge made an award reducing the weekly payments from 20*s.* to 12*s.* a week, and he stated in his note, "I reduce the compensation by 8*s.* a week until further order. Applicants to pay the costs scale B. . . . ." Subsequently he added a note as follows:—

"N.B. On further consideration I direct the award to be without costs.

"Wm. L. Selfe,
"Judge of the Court."

In the award as drawn up no costs were awarded to either party, and the registrar wrote to Dunne's solicitor that on consideration the judge thought that the applicants ought not to be ordered to pay the respondent's costs and that he therefore directed that the award should be made without costs; and, in a further letter, that the judge in the exercise of his discretion did not think fit to allow costs against an applicant who had succeeded or partially succeeded.

Dunne applied for an order that the award might be corrected under r. 28 (2.) of the Workmen's Compensation Rules, 1907—1911, by awarding costs to him, on the ground that the award

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signed by the judge, and shall be sealed and filed, and sealed copies thereof shall be served on all persons affected thereby in accordance with rule 7 of Order XXIII.; and such award shall be enforceable in the same manner as a judgment or order of the Court.

"(2.) The judge shall have power at any time to correct any clerical mistake or error in such award arising from any accidental slip or omission."

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as drawn up differed from the award made by the judge at the hearing. The judge took this view and directed that the award should be altered by striking out the directions as to costs and substituting therefor an order that John Mowlem & Co. should pay Dunne's costs. John Mowlem & Co. appealed on the ground that the judge had no jurisdiction to alter his award; that he was functus officio after he had completed his award; and that he had no jurisdiction to order them to pay Dunne's cost inasmuch as they had succeeded.

W. Ellis Hill, for the appellants. The learned judge had no power to amend an award which he had already completed and signed. Until he had signed the award he had jurisdiction to alter it as he did by directing that there should be no costs; but the power to do so ceased when the award was signed by him and sealed and filed under r. 28 (1.) of the Workmen's Compensation Rules, 1907—1911. The original alteration was clearly not a "slip" within r. 28 (2.), for the judge himself says he made it on further consideration.

[He was stopped by the Court.]

David, K.C., and *Horace Fenton*, for the applicant. The applicant is entitled to have the award drawn up as it was originally made. The learned judge had no power to reconsider it and alter his direction as to costs; his powers were at an end when he had announced his decision. The statute gives him a discretion as to costs and he exercised it by directing that they should be given to the workman; he had no power to exercise it a second time.

[COZENS-HARDY M.R. He only told the parties in Court what his award would be.

BUCKLEY L.J. A judge is entitled to stop his own order until it is drawn up.]

The procedure of the county court applies although the judge was sitting as arbitrator under the Workmen's Compensation Act, 1906. When a case in a county court is tried with a jury the judge has no power to alter the verdict: *Jones* v. *Jones*. (1)

(1) (1848) 17 L. J. (Q.B.) 170.

A county court judge cannot, except by consent or after a new trial, alter a judgment which he has formally given: *Irving* v. *Askew*. (1) A county court judge cannot rescind that part of his order which deals with costs: *The Recepta*. (2)

[BUCKLEY L.J. referred to *Lowery* v. *Walker*. (3)]

The learned judge gave the costs in the first instance, and he had no power to change his award on further consideration and in the absence of the applicant.

COZENS-HARDY M.R. In my opinion this order cannot be sustained. When the learned judge heard the application under the Workmen's Compensation Act, 1906, he was sitting, of course, as an arbitrator, and he had to make an award. What is the meaning of "an award" under this Act? It is something which must be signed by the arbitrator, and have the seal of the Court. Unless and until that is done there is no award at all. Here there was an award which was duly signed by the learned judge, duly sealed, and in all respects in conformity with r. 28 (1.). That award gave certain relief but made no order as to costs. It is said that the learned judge, at the end of the hearing, notwithstanding the argument of Mr. Ellis Hill on the one side, and the representative of the workman on the other side, said that he meant to give costs to the workman; but on thinking it over he deliberately came to the conclusion that the view he had taken was wrong as to costs, and in his discretion he directed the registrar to do that which he did, namely, to issue the award in the shape in which it was signed and sealed. Then an application was made by the workman that he should alter this award under r. 28 (2.); and the learned judge having heard that application has purported to alter the award by putting it back into the shape which it would have taken if he had not reconsidered the matter after the original hearing. Mr. Ellis Hill suggests that the learned judge had no power whatever to alter the form of the award when once made, except in a case which it is not material to consider here, where there is a clerical mistake or error in such award. Mr. David contends that the discretion

(1) (1870) L. R. 5 Q. B. 208. (2) [1893] P. 255.
(3) [1911] A. C. 10.

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of the learned judge was at an end after the case had been heard, and he could not afterwards do that which he would have done if he had thought it right. With all respect to the learned judge I think he had ample authority to alter his award until the moment that it was signed and sealed by the Court.

The authorities which have been cited by Mr. David, and which the learned judge referred to, really seem to me to have no application to this case, or if they have, they are very much in favour of this appeal. I think the learned judge had no power to alter the award after it had been signed and sealed by him. If it was wrong it ought to have been brought up to this Court to be considered and altered. The learned judge himself could not do that except in cases which fell within r. 28 (2.). In my opinion this appeal must be allowed.

FLETCHER MOULTON L.J. The only point involved in this appeal is one which is scarcely arguable on the side of the workman. There was an award drawn up in due form, signed and sealed, and the learned judge could not take it upon himself to alter that award. He had no power whatever to alter it. If it was wrongly drawn up the workman should have appealed to this Court to have it altered. The point whether it had been wrongly drawn up or not does not seem to me to be directly involved in this appeal. In my opinion the appeal must be allowed.

BUCKLEY L.J. I agree.

Appeal allowed.

Solicitors: *Mackrell, Maton, Godlee & Quincey; J. Scott Duckers.*

H. C. R.

[IN THE COURT OF APPEAL.]

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POPPLE *v.* FRODINGHAM IRON AND STEEL COMPANY.

Employer and Workman—Accident arising out of and in the Course of Employment — Compensation — Agreement to pay Weekly Sum during Total Incapacity—Record of Memorandum—Cesser of Total Incapacity—Spent Agreement—Registration—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 3; *Sched. I.* (1.), (16.); *Sched. II.* (9.).

Where an agreement has been entered into between an employer and a workman, who has been injured by an accident arising out of and in the course of his employment, for the payment of weekly compensation from the date of the accident and to continue during total incapacity for work, the Court will not direct a memorandum of the agreement to be recorded if at the date of the application to register the total incapacity has ceased.

Blake v. *Midland Ry. Co.* [1904] 1 K. B. 503, distinguished.

Coakley v. *Addie & Sons*, 1909 S. C. 545, and *Hanley* v. *Niddrie and Benhar Coal Co.*, 1910 S. C. 875, considered and explained.

THIS was an appeal from an order of the judge of the Lincolnshire County Court holden at Brigg refusing to record a memorandum of an agreement for the payment of compensation under the Workmen's Compensation Act, 1906.

On December 9, 1911, the applicant, Popple, applied to record a memorandum pursuant to paragraph 9 of the Second Schedule of the Workmen's Compensation Act, 1906 (1), stating that

(1) Sched. II., par. 9, provides that "Where the amount of compensation under this Act has been ascertained . . . . by agreement, a memorandum thereof shall be sent in manner prescribed by rules of court . . . . by any party interested to the registrar of the county court who shall, subject to such rules, on being satisfied as to its genuineness, record such memorandum in a special register, without fee, and thereupon the memorandum shall for all purposes be enforceable as a county court judgment.

"Provided that — (*a*) no such memorandum shall be recorded before seven days after the despatch by the registrar of notice to the parties interested; and (*b*) where a workman seeks to record a memorandum of agreement between his employer and himself for the payment of compensation under this Act and the employer, in accordance with rules of court, proves that the workman has in fact returned to work and is earning the same wages as he did before the accident, and objects to the recording of such

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on August 16, 1911, personal injury was caused to him by accident arising out of and in the course of his employment, and that on or about August 30, 1911, the following agreement was come to, that was to say:—"That the Frodingham Iron and Steel Company, Limited, agreed to pay and the said Tom Popple should accept the sum of 16*s*. 9*d*. per week as compensation for the said injury such weekly payment to commence as from the date of such accident and to continue during the time the workman should be totally incapacitated for work." The employers objected to the memorandum being recorded on the ground that no agreement between Popple and themselves had been made, and, further, that Popple should now resume light employment. On December 28 the applicant gave notice of his intention to apply to the judge for the registration of the memorandum. On January 4, 1912, the respondents gave notice that in addition to the grounds set out in their former notice they intended to rely on the further ground that the agreement, if any such existed, was terminated by the terms thereof. At the hearing before the county court judge the terms of agreement as set out in the application were admitted on both sides. The judge refused to record the agreement until medical evidence was adduced to shew whether the applicant was on December 9 totally incapacitated for work and whether the agreement was on that date operative. Objection was taken to such evidence being admitted. Medical evidence was called which satisfied the learned judge that the applicant was not on December 9 totally incapacitated, and, that being so, he refused to record the memorandum. From this refusal the workman appealed.

C. Doughty and *H. J. Wallington*, for the appellant. The agreement here is admitted and there is no dispute as to its genuineness. The appellant is therefore entitled to have a memorandum of it recorded: Workmen's Compensation Act, 1906, Sched. II. (9.).

[COZENS-HARDY M.R. Does not "genuineness" include "existing"?]

memorandum, the memorandum shall only be recorded, if at all, on such terms as the judge of the county court, under the circumstances, may think just; . . . ."

In *Coakley* v. *Addie & Sons* (1) there was an agreement to pay compensation during total incapacity, and the employers objected to the memorandum being recorded on the ground that total incapacity had ceased, and it was held that that was no objection as to the genuineness of the memorandum; and in *Blake* v. *Midland Ry. Co.* (2) it was held, under the corresponding provision in Sched. II. (8.) of the Act of 1897, that there must be a record of there having been an agreement in fact.

[BUCKLEY L.J. The use of the words "if at all" in Sched. II. (9.) (*b*) shews that there is a right to refuse registration under some circumstances.]

Those words do not govern the whole of paragraph 9. The appellant is entitled to a record that the matter has been decided by agreement without arbitration. The effect of the agreement as a step in future proceedings is not exhausted. [They also referred to *Fox* v. *Battersea Borough Council* (3) and *Ibrahim Said* v. *Welsford*. (4)]

Giveen, for the respondents. The object of this provision in the schedule is not to record history. Sched. II. (9.) deals only with an enforceable agreement. The respondents rely upon the observations in the dissenting judgment of Buckley L.J. in *Charing Cross, Euston and Hampstead Railway* v. *Boots*. (5) An agreement which is spent cannot be enforced as a county court judgment. In *Hanley* v. *Niddrie and Benhar Coal Co.* (6) there are observations in the judgments which shew clearly that the agreement to be recorded must be a subsisting agreement. See also *McEwan* v. *William Baird & Co.* (7)

Wallington in reply. If a recrudescence of the incapacity is possible the workman is entitled to have a memorandum of the agreement recorded. It was the intention of this Act that these matters should be recorded subject to review. A workman ought not to be put to the expense of commencing fresh proceedings for an award.

Cur. adv. vult.

(1) 1909 S. C. 545.
(2) [1904] 1 K. B. 503.
(3) (1911) 4 B. W. C. C. 261.
(4) (1910) 3 B. W. C. C. 233.
(5) [1909] 2 K. B. 640, 646.
(6) 1910 S. C. 875.
(7) 1910 S. C. 436.

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March 28. COZENS-HARDY M.R. (after stating the facts as above set out). The main question for our decision is this, whether an agreement which is no longer in force can be recorded. By s. 1, sub-s. 3, of the Act, it is recognized that any question as to (inter alia) "the liability to pay compensation" under the Act may be settled by agreement. Paragraph 9 of Sched. II. provides that where the amount of compensation under the Act has been ascertained by agreement a memorandum thereof shall be sent to the registrar of the county court, who shall, "on being satisfied as to its genuineness," record such memorandum, "and thereupon the memorandum shall for all purposes be enforceable as a county court judgment." Rule 67 of the Workmen's Compensation Rules, 1907, contains provisions as to the issue of execution. In my opinion, as a matter of construction, paragraph 9 applies only to compensation payable and does not extend to compensation which, as a matter of history, was payable at some past date. For example, an agreement for a weekly payment expressed to be payable only up to December 31 could not be recorded in January, if all payments up to December 31 had been duly made. The same result must, I think, follow if the agreement, as a matter of construction, extends only during the continuance of a certain state of things unless it is established that that state of things still continues. It was scarcely disputed that the agreement, the memorandum of which it was sought to record, ceased to be operative as soon as total incapacity ceased, and I think it could not be fairly construed as an agreement to pay if and so often as total incapacity should at any time exist. No execution could properly issue except on the footing that the agreement is still in force. Apart, therefore, from authority, I should hold that the learned county court judge was quite right in the view which he took. There is no authority adverse to this view in this Court. *Blake* v. *Midland Ry. Co.*(1) is plainly distinguishable because there the agreement was, as appears from the report in the *Law Times* (2), for payment "during total or partial incapacity." In other words the agreement was still operative though total incapacity had ceased. The same conclusion would be arrived at by holding that the word "genuine"

(1) [1904] 1 K. B. 503. (2) 90 L. T. 433.

in itself implies not merely an agreement which in truth was made, but also that the agreement so made is one capable of being enforced as a county court judgment. If so, it is plain that the registrar must be satisfied that the agreement is a subsisting agreement in this sense, that either at the moment when application to record is made there is, or at some future date there may be, ground for applying to the county court to enforce the memorandum as a judgment.

There are, however, cases in the Scotch Courts which are said to be inconsistent with the above views, and my respect for the learned judges of the Court of Session has made it incumbent upon me to consider those cases with care. In *Coakley* v. *Addie & Sons* (1) the precise point arose. The agreement was to pay 15*s.* 9*d.* a week during total incapacity. The employers objected on the ground that the claimant's total incapacity had ceased prior to the memorandum being presented for registration. The sheriff-substitute held that this was not a valid objection and granted warrant to record the memorandum. The case was heard before the Second Division, and the judgment of the Court —consisting of the Lord Justice-Clerk, Lord Low, Lord Ardwall, and Lord Dundas—was delivered by Lord Low. They held that the sheriff-substitute was right, and that the objection could not properly be regarded as an objection to the "genuineness" of the memorandum. From a passage in Lord Low's judgment at p. 553 I infer that he construed the agreement not as one which had come to an end at the date of the application to record, but rather as an agreement which would be available in the event of subsequent incapacity. If so, I feel no difficulty in the decision. The passage to which I refer is as follows: "The fact that the respondent was no longer totally incapacitated, or indeed incapacitated at all, when he presented the memorandum for registration, does not necessarily involve that the agreement had come to an end so that it could never again be founded upon by either party. A workman may apparently recover completely from the effects of an accident, but may subsequently, perhaps after a long lapse of time, again become totally incapacitated. In such a case he would be entitled to found upon an

(1) 1909 S. C. 545.

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agreement come to when he was first disabled as settling the amount of compensation." Nevertheless there are observations strongly in favour of the appellant's argument. The attention of the Court does not seem to have been called to the enforceability of the memorandum as a county court judgment.

In the following year a similar question came before the First Division in *Hanley* v. *Niddrie and Benhar Coal Co.* (1) The workman applied to record a memorandum of agreement. The employers objected (inter alia) that prior to the application for registration the workman had signed a final discharge of his claims, to which the workman rejoined that such discharge, if any, was signed by him under essential error. The sheriff-substitute refused in the proceeding to record to determine the validity or invalidity of the discharge. The judges—Lord Kinnear, Lord Johnston, and Lord Salvesen—all held that the sheriff-substitute was wrong. In the words of Lord Kinnear at p. 880, " In substance the objection is that he " (the workman) " is seeking to enforce the claim, and for the purpose of enforcing it by diligence, to obtain the registration of a memorandum, while he has already given a complete and effective discharge of all claims. Now, that is a question of fact and law which the parties were fully entitled to bring before the sheriff-substitute, and which I think he was bound to decide." In the words of Lord Johnston at p. 884, " It is clear that if a memorandum of the agreement is to be registered and so have the force of a registered decree-arbitral and be warrant for diligence, injustice may be done if the discharge is not so dealt with as to be an effectual answer to any attempt to enforce the agreement." Lord Salvesen at p. 885 is equally clear: " I also think it is clearly implied that the agreement is a subsisting agreement, because the object of the recording of the memorandum is to enable the workman to do diligence upon it." I respectfully agree with these observations, and I think they apply, in principle, to a case, like the present, where the agreement is spent and where no execution could in any event be issued upon it.

But it is right that I should add that Lord Salvesen (p. 886)

(1) 1910 S. C. 875.

states that he agrees with Lord Low's judgment in *Coakley's Case* (1): "The sole question was whether the memorandum should be recorded in view of the fact that the workman when he presented his application was admittedly no longer incapacitated."

Apparently he thought the agreement in *Coakley's Case* (1) was not wholly spent, but might thereafter be the foundation for a judgment though not available at the moment for that purpose. In that view of the agreement there is no difficulty. If there is any difference between the views of the two Divisions, I prefer the views of the First Division. But I am not satisfied that there is anything in *Coakley's Case* (1), when properly considered, which is necessarily inconsistent with the opinion I have expressed.

A good deal of argument was addressed to us upon the effect of clause 9 (*b*) of the Second Schedule. It shews that in one particular case, where the right to receive compensation is suspended only, the workman cannot claim, as of right, to have the memorandum recorded. This sub-section seems to me in no way to assist the appellant, but I do not base my decision upon it.

Upon the whole, I think the order of the county court judge was correct, and the appeal must be dismissed with costs.

FLETCHER MOULTON L.J. I entirely agree with the judgment of the Master of the Rolls.

BUCKLEY L.J. The sections of the Act relevant to the point for decision are s. 1, sub-s. 3, Sched. I. (1.) and (16.) and Sched. II. (9.). From those provisions and from the general tenor of the Act I hold the following propositions to be true:—

1. The agreement must be one settling a question as to liability to pay compensation under the Act: s. 1, sub-s. 3.

2. It must be confined to compensation in case of either death or total or partial incapacity: Sched. I. (1.).

3. The obligation must not extend beyond an obligation to pay money and must not be contingent upon any event other than death or total or partial incapacity.

4. It must be a subsisting agreement under which either arrears or future payments are or may become due.

(1) 1909 S. C. 545.

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The first proposition requires no statement or amplification.

The second rests upon the fact that the agreement is an alternative to arbitration under the Act. If it lays upon the employer any obligation larger than that which could be imposed upon him by award, it is not an agreement under the Act and is not registrable.

The third follows from the fact that the agreement when recorded is to be enforceable as a county court judgment: Sched. II. (9.). It must be an agreement to pay money expressed in terms similar to those in which a county court judgment for payment of money could be expressed. It must not contain further and other obligations. The agreement could not, for instance, contain a clause restraining the workman contractually from working for a rival trader. Neither could it be expressed to be contingent upon an event the occurrence of which would have to be proved as a condition precedent to issuing execution. The contingency of the continuance of total or partial incapacity is not a contingency to which this observation applies, for from the general tenor of the Act and from Sched. I. (16.) it is obvious that means are provided for dealing with a contingency of that kind and modifying the agreement according to varying circumstances.

The fourth proposition rests upon the fact that the agreement is to be enforceable: Sched. II. (9.). An agreement which has been rescinded, an agreement limited in time to a past date and which has been wholly satisfied are excluded because they are not enforceable. I remain of the opinion which I expressed in *Charing Cross Railway* v. *Boots*. (1) To express the same thing in another form, the initial words of Sched. II. (9.) are to be read as meaning "Where the amount of compensation *payable* under this Act," &c. Upon these propositions there are to be found in two cases in Scotland, *McEwan* v. *William Baird & Co.* (2) and *Hanley* v. *Niddric and Benhar Coal Co.* (3), expressions of the learned judges in Scotland with all of which I respectfully agree. I refer in particular to the judgment of Lord Kinnear in the former case and that of Lord Salvesen

(1) [1909] 2 K. B. 640. (2) 1910 S. C. 436.
(3) 1910 S. C. 875.

in the latter. Those cases were, I think, rightly decided. If they are right the decision of the county court judge in the present case is right.

An argument was pressed before us that under Sched. II. (9.) there was always a right to record an agreement which in fact had been made and which at some time had been in force. This argument was rested on the word "genuineness." The words "if at all" in Sched. II. (9.) (*b*) shew, I think, that the argument cannot be maintained. The word " genuine " is not to be confined to "admitted" or " proved " in fact. It extends to the meaning of "existing as evidencing an obligation enforceable either presently or at a future date." With the two Scotch decisions to which I have referred I cannot reconcile *Coakley* v. *Addie & Sons* (1) unless, as is possible, there be ground for saying that the agreement was there treated as subsisting. However this may be, it seems to me that the reasoning of Lord Low in that case is not reconcilable with that in the other two cases, and so far as it differs I am not able to agree with it. There is a decision in England—*Blake* v. *Midland Ry. Co.* (2)—which can, I think, be supported upon the particular facts of that case. From the report in 90 L. T. 433 there appears that which does not appear from the report in the *Law Reports*, that the agreement was one to pay during the total or partial incapacity of the workman, and the decision was only that so long as incapacity subsisted it was no objection to recording the agreement that since its date circumstances had altered and the amount payable in respect of compensation might properly be readjusted by way of diminution. The agreement was, and Wills J. at p. 507 speaks of it as being, an existing agreement. But in that case again I am unable to agree with some of the reasoning, as for instance the passage in which Wills J. says at p. 506 that the memorandum of the agreement is to be genuine, not that it is to be in force at the time it is registered.

In the case before us the agreement was to continue during the time the workman should be wholly incapacitated for work. The judge has found that that time has expired and that the agreement is spent and therefore ought not to be recorded.

(1) 1909 S. C. 545; 2 B. W. C. C. 437. (2) [1904] 1 K. B. 503.

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Upon that finding the decision in my opinion is right, and this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Charles B. Shepherd, for March, Pearson & Akenhead, Manchester; Cox & Lafone, for A. Wainwright, Grimsby.*

G. A. S.

C. A. 1912 *March* 27.

[IN THE COURT OF APPEAL.]

RYAN *v.* HARTLEY.

Employer and Workman—Compensation—Injury occasioned by Accident—Agreement for Payment of Lump Sum—Registration — Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. II., cl.* 10.

There is nothing in the Workmen's Compensation Act, 1906, to prevent an adult workman before entering a claim for an award and before any payment of a weekly sum has been made to him from coming to an arrangement by way of compromise with his employer to accept a lump sum in satisfaction of all claims in respect of an injury occasioned by an accident which has happened to him whilst in the employer's service, and such agreement, if entered into, will be valid although not registered under the Act.

Clause 10 of Sched. II. presupposes that a weekly payment has been made which but for the existence of the agreement to pay a lump sum would have continued, and has no application to a case where no weekly payment has ever in fact been made.

APPEAL from an award of the judge of the Yorkshire County Court holden at Sheffield upon an arbitration under the Workmen's Compensation Act, 1906.

The applicant, C. W. Hartley, was employed as a bricklayer by the respondent, J. Ryan.

On October 22, 1910, whilst engaged in removing wood from an arch at the respondent's works, he received an injury to the tendon of his left leg in consequence of the ladder on which he was working slipping and throwing him to the ground.

On December 22, 1911, the applicant commenced proceedings to recover compensation at the rate of 17*s.* 6*d.* a week during incapacity, which in his application he alleged had lasted till March 29, 1911. He admitted that he had received from the respondent 35*s.*, which he alleged represented payment for two weeks at 17*s.* 6*d.* a week.

The respondent by his answer alleged that the particulars in the application were incomplete and denied his liability to pay any compensation under the Act and stated that he intended to give in evidence and rely on the following facts at the arbitration:—That the applicant fully recovered from any injury within a fortnight of October 22, 1910, and resumed work at the same rate of wages.

At the hearing before the county court judge the case turned entirely on the question whether the applicant had accepted the 35*s.* in satisfaction of all claims in respect of the accident.

The respondent in the course of his evidence stated that he saw the applicant on November 11, 1910, and asked him what he would accept in settlement, and that the applicant agreed to take 35*s.*, and that he saw the applicant again on November 20, 1910, and told him he would pay the money upon his signing a receipt which he then produced.

The receipt in question was one which the respondent had obtained from his insurance company and was in the following terms:—

"Received this 20th day of November, 1910, from C. W. Hartley the sum of 1*l.* 15*s.* 0*d.* in full satisfaction and liquidation of all claims on the said company (*sic*) under the Workmen's Compensation Act, 1906, the Employers Liability Act, 1880, and the common law in respect of injuries whether now or hereafter to become manifest arising directly or indirectly from an accident which occurred to me on or about the 22nd day of October, 1910.

"1*l.* 15*s.* 0*d.*

"Name.....

"Occupation .....

"Address....."

The applicant filled in the date, his occupation and address, but omitted his signature.

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There was a direct conflict of evidence as to what took place at the interview. The respondent alleged that he went with the applicant into a public-house to get a pen and ink and that the applicant read over the receipt and, having filled in something with the pen, folded up the receipt and handed it back to him, and that he thereupon paid the applicant the 35*s*. He further alleged that it was not until a subsequent date that he discovered that the applicant had omitted to sign the receipt.

The applicant denied that he had ever agreed to accept the 35*s*. in full settlement, and said that when he discovered that the receipt purported to give a full discharge for any compensation payable in respect of the accident he refused to sign it.

The county court judge disbelieved the evidence of the applicant and found that the 35*s*. had been accepted by him in full settlement and that his signature had been left out by a trick. He therefore dismissed the application.

The applicant appealed.

Harold Morris and *H. R. Bramley*, for the applicant. The only issue before the county court judge was when the incapacity of the applicant ceased. He has therefore mistaken the law by holding that the receipt, which was not signed, was evidence of an oral agreement to accept a lump sum in satisfaction of all claims in respect of the accident. In the respondent's answer no mention was made of this receipt. It is true that at the hearing something was said as to an amendment of the answer by pleading it, but no amendment was in fact made.

Assuming, however, that the answer was to be treated as amended, the sole question then for the county court judge was whether the agreement constituted by the receipt was one which ought or ought not to be recorded: *Mortimer* v. *Secretan*. (1) The respondent was under a liability to make weekly payments to the applicant. An agreement for the payment of a lump sum cannot be validly made unless the registrar is of opinion that the sum is adequate: Sched. II., clause 9. An oral agreement for the payment of such a sum can be recorded: *Field* v. *Longden*

(1) [1909] 2 K. B. 77.

& Son. (1) The agreement in the present case ought to have been registered. If the respondent had attempted to register it the registrar would have had to consider whether the 35*s.* paid by the respondent to the applicant was an adequate sum, and if he was of opinion that it was not he would have been bound under Sched. II., clause 9 (*d*), to refer the matter to the county court judge, who would then have to consider the adequacy of the amount: *Owners of the Ship Segura* v. *Blampied.* (2) The county court judge has found that there was an agreement, but the matter was not gone into to see whether the consideration for it was adequate. The agreement was never registered as required by Sched. II., clause 10, and is therefore no answer to the applicant's claim.

V. M. Coutts Trotter, for the respondent, was not called upon.

COZENS-HARDY M.R. This is an appeal by a workman from an award of the county court judge, who has held that the workman was debarred from claiming compensation by reason of his having accepted 35*s.* in full settlement of all his claims, and, further, that he left his name out of the receipt by a trick. The case has been argued before us on two grounds. First of all it is said, and with truth, that in the respondent's formal answer no suggestion is made of the existence of this receipt in full settlement and that the only issue before the county court judge was as to when total incapacity ceased. But Mr. Bramley, who was present at the hearing before the county court judge, with perfect frankness and propriety admits what Mr. Coutts Trotter on his instructions suggests, namely, that the question of an amendment of the answer was discussed, and I think it is quite clear that for the purposes of this claim we must treat that amendment as in fact having been made in order to enable justice to be done between the parties. Of course, if there had been any surprise in this case, the workman might have asked that the case should stand over if the amendment was allowed. If such an application had been made I cannot doubt that it would have been acceded to. I think, therefore, that the

(1) [1902] 1 K. B. 47. (2) (1911) 4 B. W. C. C. 192.

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difficulty raised by the omission of the amendment counts for nothing.

Then how does the matter stand? The evidence is quite clear that no weekly payment was ever made to the workman by the employer. The only payment which was admittedly made to him was a sum of 35*s.* which was paid in November, some short time after the accident. The learned county court judge finds that it was through a trick that the receipt for this sum was not signed by the workman, but that it was read by him and handed back to the employer unsigned. [His Lordship then read the receipt, and continued:] Now is there anything in the Act to prevent an adult workman before entering a claim for an award and before any payment of a weekly sum has been made from coming to an arrangement by way of compromise with the employer, that the employer will pay and that he will accept a sum of money in satisfaction of all his claims? All that I find in the Act is this: that when there has been either an award of a weekly sum or a recorded agreement for payment of a weekly sum, there is in either case that which is enforceable as a county court judgment, so that execution can be levied, and that in neither of those cases can an agreement for the redemption of the weekly payment by a lump sum be validly made unless the registrar considers the sum adequate. Then by Sched. II., clause 10, "An agreement as to the redemption of a weekly payment by a lump sum if not registered in accordance with this Act shall not, nor shall the payment of the sum payable under the agreement, exempt the person by whom the weekly payment is payable from liability to continue to make that weekly payment . . . . unless . . . . he proves that the failure to register was not due to any neglect or default on his part." What do the words "liability to continue to make that weekly payment" mean? They presuppose that there has been a weekly payment made which would have continued but for the existence of an agreement to pay a lump sum. In my opinion that clause has no application whatever to a case where, as here, no weekly payment has ever in fact been made, even though the gross sum paid was a sum which may be said to have been calculated with reference to the workman's weekly wages. For these reasons I

think this appeal fails and must be dismissed with the usual consequences.

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FLETCHER MOULTON L.J. I agree.

BUCKLEY L.J. I agree.

Appeal dismissed.

Solicitors: *Shaen, Roscoe, Massey & Co., for Broomhead, Wightman & Moore, Sheffield; Telfer Leviansky & Co., for Clegg & Sons, Sheffield.*

W. I. C.

[IN THE COURT OF APPEAL.]

C. A. 1912 *March* 21.

FRITH *v.* OWNERS OF S.S. LOUISIANIAN.

Employer and Workman—Compensation—Accident arising out of and in the Course of Employment—Ship—Intoxicated Sailor—Absence from Ship without Leave—Return to Duty—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A sailor went ashore without leave on the evening before his ship was due to sail from the port where she was lying. He remained ashore all night. The next morning, the ship's gangways having been taken in, the mooring ropes cast off, and the vessel being still alongside, the sailor returned and was pushed on board in a helpless state of intoxication by two persons who helped him along the quay. He reached the deck on his hands and knees and lay there for a minute or two while the ship was gradually moving away from the quayside. He then attempted to get up, staggered backwards, fell overboard, and was drowned.

Upon a claim for compensation under the Workmen's Compensation Act, 1906, the county court judge held that, the sailor having regained his ship, the accident arose out of and in the course of his employment, and he awarded compensation:—

Held, on appeal, that the sailor had not regained his ship in a condition to perform his duties. The accident was due solely to his intoxication and did not arise out of his employment.

APPEAL from an award of the judge of the Lancaster County Court sitting at Liverpool as arbitrator under the Workmen's Compensation Act, 1906, in favour of two daughters as partial dependants of Henry Frith, an able seaman on board the steamship *Louisianian*, who was drowned at Mobile, in the United States of

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America, on October 15, 1911, under circumstances which the applicants alleged constituted an accident arising out of and in the course of his employment. The employers denied their liability under the Act on the ground that the alleged accident did not arise out of and in the course of the employment.

The following facts were found by the county court judge:—

The deceased man went ashore on the evening before the *Louisianian* sailed from the port of Mobile, United States of America, without leave. He remained ashore all night. On the morning of October 15, when the ship had got in her gangways, cast off her ropes from the quay, and was already moving, her deck being still alongside and about level with the wall of the quay, the deceased man was observed being partially carried towards the ship by a negro, in such a state of intoxication as to render him unable to walk by himself. With the assistance of a man standing on the quay and the negro the deceased was pushed on to the deck of the *Louisianian* at the place where No. 2 gangway had been. He reached the deck on his hands and knees in such a condition of incapacity, due to intoxication, as to resemble a sack of sand. When he got on board he lay on the deck without moving for a minute or two, during which the vessel was angling out from the quay. When the side of the vessel had got about three feet from the quay the deceased tried to get on to his feet on the deck, but staggered backwards and fell into the water. At that spot the ship's rail had not been replaced in position after taking in the gangway. A line was thrown to the deceased, but he did not struggle to seize it, and he was drowned.

Upon these facts the learned county court judge said that having carefully considered the authorities he felt bound, with great reluctance, to come to the conclusion that, the sailor having once regained his ship, the Act applied. He therefore held that the accident arose out of and in the course of the deceased's employment, and made an award in favour of the applicants.

From this award the employers appealed.

Cuthbert Smith, for the appellants. The learned county court judge has held that, the deceased having got back to the place of

his employment, the accident arose out of and in the course of his employment. That is not a correct view of the law; the sailor must, in order for the Act to apply, have regained his ship in such a condition as to be fit to resume his employment: *Low* or *Jackson* v. *General Steam Fishing Co., Ld.* (1); *Kitchenham* v. *Owners of S.S. Johannesburg.* (2) The accident in this case arose, not out of the employment, but out of the man's drunkenness.

In *Moore* v. *Manchester Liners, Ld.* (3) Cozens-Hardy M.R. said: "If a sailor has been out for his own amusement, whether with or without consent, his right to protection under the Act is complete when once he has got back on board the vessel." The county court judge may have been misled by that statement. No doubt that was the test there, as also in *McDonald* v. *Owners of S.S. Banana* (4); but that does not conclude this case.

Hanbury Aggs, for the respondents. There is no question that this accident arose out of the man's employment. He was on a moving ship, and that had the effect of causing him to fall overboard. The distinction between arising "out of" and "in the course of" is dealt with by Farwell L.J. in his judgment in *Kitchenham* v. *Owners of S.S. Johannesburg.* (5) The nearest authority is afforded by *Robertson* v. *Allan Brothers* (6), where the seaman had actually returned to the ship and fell into the hold from the deck. See also *Wicks* v. *Dowell & Co., Ld.* (7) Here the drunkenness, which was no doubt a remote cause of the accident, does not prevent its being held that the accident arose out of and in the course of the employment.

COZENS-HARDY M.R. This is an appeal from the county court judge at Liverpool, who has given a judgment which shews very great care and consideration of the authorities, but with the utmost respect I think he has applied the wrong principle.

The facts which he finds are not disputed. The deceased man was a sailor on a ship at Mobile, which port she

(1) [1909] A. C. 523.
(2) [1911] A. C. 417.
(3) [1909] 1 K. B. 417, 420.
(4) [1908] 2 K. B. 926.
(5) [1911] 1 K. B. 523.
(6) (1908) 77 L. J. (K.B.) 1072.
(7) [1905] 2 K. B. 225.

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was just on the point of leaving, and with the boatswain, without leave, he went ashore. The evidence justified the learned judge in finding, as he did, that the regulation as to leave was not merely a paper regulation, but was a regulation which was enforced as far as it could be. The men went on shore the evening before the ship sailed. The vessel was on the point of starting when they returned. She had been close to the quayside and was getting up steam and a tug was pulling her round. The boatswain, who had obviously taken too much drink, was able to walk along the quay and get on board the vessel safely and go to his room; he was probably too much affected to have been of much use in the discharge of his duties for some hours, but fortunately nothing happened to him. The sailor, Frith, was in a far more advanced stage of intoxication. The learned judge finds, and the evidence is all one way, that he could not walk. A negro helped him along the quay, and, according to one of the witnesses, almost lifted him along. When he got alongside a part of the ship, the negro and another man who happened to be on the quay pushed him on to the deck, so that he went over on his hands and knees; he was put on board as though he had been a sack of sand. He was not put on that part of the vessel where he ought to have been for the purpose of his duty. He ought to have been on an entirely different part of the ship, and had no business to be where he was. He was obviously totally incapacitated from discharging any of the duties which attached to his office, and he did not attempt to perform them. The man after an interval of a few minutes, having been put on the deck like a sack of sand, attempted to get up, reeled backwards, and fell over the side of the vessel, which by that time had moved some two or three feet away from the quay, and thus met his death. It is true that at that part of the vessel the rail where the second gangway had been had not been replaced. The learned judge held that the sailor having physically got on board the ship was within the ambit of his employment, and he really had to say what other consequences followed from that. With great reluctance he felt himself obliged to come to the conclusion that once having regained his ship the Act would apply, and that he must

therefore hold that the accident arose out of and in the course of the deceased's employment. With great respect to the learned judge I think that is a mistaken view of the law. In the first place it must be proved that the accident arose in the course of the employment, for which purpose knowing whether he had got on board the ship or not is a very material matter. I desire to keep an open mind on the question, if it ever becomes necessary to decide it, whether in a case of this kind, where a sailor's duties are on the after part of a ship, and he does not get there, but gets on the fore part of the ship, and an accident happens, it is in the course of the employment. But I assume it is for the present purpose. Then there is a further step. Was the death of this man caused by an accident arising, and arising solely, by reason of his brutal intoxication? It seems to me perfectly idle to say that the matter is solved when it is proved that he has got within the ambit of his employment. Many cases have arisen. By way of illustration, it has been held that a sailor cannot recover compensation if the injury is due to skylarking. It has been held also that the right to compensation does not arise unless, in the language I think of Lord Loreburn L.C., and certainly of this Court in several cases, it is proved that the injury was caused by an accident which was in some way connected with the work the man was doing, by which he was exposed to special danger. If this man had been ordered to go aloft, or anything of that kind, when in a state of intoxication, and met with an accident, it might very well be that that would have been an accident arising out of the employment notwithstanding his drunkenness. But here he had not in any real sense of the word got back to his work. He never got on board the ship in a physical condition to enable him to do his work; and in my opinion the only true finding here, which is a matter of fact, is that the injury was not due to an accident arising out of his employment, but was due, and due solely, to the hopeless state of drunkenness he was in. I am pleased to think that the learned judge would gladly have come to the conclusion at which I have arrived. This is a case which is outside the whole line of authorities to which our attention has been called, and the appeal must be allowed with the usual consequences.

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FLETCHER MOULTON L.J. I am of the same opinion. The learned judge appears to have thought that if the sailor was on the ship anything that happened by reason of his being there would bring him within the purview of the Act. That is not so. The accident must arise out of his employment. In my opinion this accident had nothing whatever to do with the employment except that it occurred more or less in the place of employment, that is on board the ship. It arose entirely out of his state of drunkenness. For these reasons I think this appeal must be allowed.

BUCKLEY L.J. In *Barnes* v. *Nunnery Colliery Co.*(1) Lord Loreburn L.C. says: "The question whether or not an injury by accident arose out of the employment is quite different from the question whether there has or has not been misconduct. An arbitrator has to ask himself, was the injury by accident caused by something reasonably incidental to the employment, by some risk to which a workman, liable like other men to be careless and take short cuts, might be exposed in doing what he had to do?" If the accident arises out of the employment and death results it is immaterial that there was misconduct. If the accident arises out of the misconduct that does not bring the case within the Act. Misconduct does not raise a claim. Misconduct is no defence to a claim in respect of an accident arising out of and in the course of the employment.

The whole question here is whether the accident to this man arose out of his employment. I have not the smallest hesitation in answering that in the negative. It arose out of the fact that he was so hopelessly drunk that he could not stand, and I doubt whether he could see. He had gone on shore without leave, which by itself is misconduct, and had got drunk there; he came back so drunk that he was thrown on the deck like a sack of sand; he staggered to his feet after a minute or two and fell over the side of the ship. He was not engaged on his employment; he was not fit for the performance of his employment. If he had been in his employment he would not have been in that part of the ship, but elsewhere. He was within the ambit of the

(1) [1912] A. C. 44.

employment in the sense that he was on board the ship; but the accident did not arise out of his employment, but out of the fact that he was so drunk that he could neither stand nor see. I think the appeal should be allowed.

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Appeal allowed.

Solicitors: *Hill, Dickinson & Co., Liverpool; Edward Lloyd, Liverpool.*

G. A. S.

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Education—Public Elementary School—New Non-provided School—Power and Duty of Local Education Authority to provide Furniture—Education Act, 1902 (2 *Edw.* 7, *c.* 42), *ss.* 7, 8.

Where persons other than the local education authority provide a new school under the provisions of s. 8 of the Education Act, 1902, the local authority have power to provide and pay for the furniture required to equip it as a public elementary school by reason of the obligation imposed upon them, by s. 7, sub-s. 1, to "maintain and keep efficient all public elementary schools within their area which are necessary."

Two new non-provided schools were opened as public elementary schools and each school was subsequently placed by the Board of Education upon the annual grant list as from the respective dates of opening. All the furniture for one school was supplied and paid for by the local education authority before it was opened; the other school, when opened, was provided with furniture belonging to the managers, which was unsuitable and shortly afterwards removed by the local authority and replaced by new furniture at their expense:—

Held (Darling J. dissenting as to the unfurnished school), that the local education authority had power to provide and pay for the new furniture of each school under s. 7, sub-s. 1, of the Education Act, 1902.

RULE NISI for a writ of certiorari to quash certain disallowances and surcharges made by the respondent as district auditor.

The promoters of two new non-provided schools in the city of Liverpool duly gave notice of their intention to provide such

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schools, under s. 8 of the Education Act, 1902, and no appeal was carried to the Board of Education under that section.

The plans for one of these schools, called St. Sebastian's, were approved by the Board of Education on October 13, 1908. The school buildings were completed, and the school was opened on May 3, 1909; and on October 29, 1909, the Board of Education informed the local education authority that the school had been placed on the annual grant list as from May 3, 1909. At the date of the opening the promoters had provided the school with furniture; but this furniture was unsuitable and was removed by the local authority, who supplied new desks and cupboards on August 10, 1909, and subsequently paid for them.

The plans for the other school, called St. Hugh's, were approved by the Board of Education on January 8, 1909. The school buildings having been completed, the school was opened on September 6, 1909; and on June 28, 1910, the Board intimated to the local education authority that the school was placed on the annual grant list as from September 6, 1909. The promoters had not provided any furniture for this school, and on August 31, 1909, the education authority supplied new desks and cupboards for the use of the school and afterwards paid for them.

The district auditor disallowed the payments made for the desks and cupboards for each school, and surcharged the members of the education authority who had authorized these payments. The auditor, by his certificate, stated that his reasons for the disallowance of these payments were that "at the time the furniture was supplied to these schools they were not 'public elementary schools,' within the meaning of s. 7 of the Education Act, 1902 (1), and the local education authority was not

(1) 2 Edw. 7, c. 42, s. 7:

"(1.) The local education authority shall maintain and keep efficient all public elementary schools within their area which are necessary, and have the control of all expenditure required for that purpose, other than expenditure for which, under this Act, provision is to be made by the managers; but, in the case of a school not provided by them, only so long as the following conditions and provisions are complied with:—

" . . . .

"(*d*) The managers of the school shall provide the school house free of any charge,

therefore under any legal obligation to maintain and keep them efficient."

The applicant, who was one of the members surcharged, obtained a rule calling upon the auditor to shew cause why a writ of certiorari should not issue to remove into the King's Bench Division the disallowances and surcharges made by him and specified in his certificate in order that they should be quashed.

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except for the teacher's dwelling-house (if any), to the local education authority for use as a public elementary school, and shall, out of funds provided by them, keep the school house in good repair, and make such alterations and improvements in the buildings as may be reasonably required by the local education authority: Provided that such damage as the local authority consider to be due to fair wear and tear in the use of any room in the school house for the purpose of a public elementary school shall be made good by the local education authority.

"(4.) One of the conditions required to be fulfilled by an elementary school in order to obtain a parliamentary grant shall be that it is maintained under, and complies with, the provisions of this section."

Sect. 8: "(1.) Where the local education authority or any other persons propose to provide a new public elementary school, they shall give public notice of their intention to do so, and the managers of any existing school, or the local education authority (where they are not themselves the persons proposing to provide the school), or any ten ratepayers in the area for which it is proposed to provide the school, may, within three months after the notice is given, appeal to the Board of Education on the ground that the proposed school is not required, or that a school provided by the local education authority, or not so provided, as the case may be, is better suited to meet the wants of the district than the school proposed to be provided; and any school built in contravention of the decision of the Board of Education on such appeal shall be treated as unnecessary.

"(2.) If, in the opinion of the Board of Education, any enlargement of a public elementary school is such as to amount to the provision of a new school, that enlargement shall be so treated for the purposes of this section.

"(3.) Any transfer of a public elementary school to or from a local education authority shall for the purposes of this section be treated as the provision of a new school."

Second Schedule, clause 14: "The local education authority shall be entitled to use for the purposes of the school any school furniture and apparatus belonging to the trustees or managers of any public elementary school not provided by a school board, and in use for the purposes of the school before the appointed day" (March 26, 1903).

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Buckmaster, *K.C.*, and *Rowlatt* shewed cause. Under s. 7, sub-s. 1, of the Education Act, 1902, the local education authority are bound to maintain and keep efficient all public elementary schools within their area which are necessary. As applied to a "non-provided school" the expression "school" does not there mean merely school buildings, but means a school properly equipped as a school. In the case of a new non-provided school, erected under s. 8, the responsibility of the local education authority does not begin until there is a properly equipped school. The natural meaning of the words "maintain and keep efficient," in sub-s. 1 of s. 7, is that the obligation is only to maintain and keep efficient a school which is efficient and not to put it into a state of efficiency by providing the equipment in the first instance. The real distinction is that between capital and income expenditure, and the local education authority is only responsible, under the words "maintain and keep efficient," for income expenditure; and the expense of equipping a new school is capital expenditure. The Elementary Education Act, 1870 (1), in s. 3, defines an "elementary school" to mean "a school or department of a school at which elementary education is the principal part of the education"; s. 7 provides that "every elementary school which is conducted in accordance with the following regulations shall be a public elementary school within the meaning of this Act"; one of those regulations (s. 7, sub-s. 4) is that "the school shall be conducted in accordance with the conditions required to be fulfilled by an elementary school in order to obtain an annual parliamentary grant"; and the conditions are stated, in s. 97, to be those contained in the minutes of the Education Department in force for the time being. The conditions are now contained in the Code of Regulations, which, by art. 20 (2), provides that a school must be adequately and suitably

(1) 33 & 34 Vict. c. 75.

(2) Code of Regulations for Public Elementary Schools, 1909, art. 20: "The school must be adequately and suitably equipped with the apparatus requisite for its curriculum, including desks, furniture, books, and maps. Provision should be made for securing an adequate supply of suitable books for the course of general reading in the higher classes of the school, and for bringing to the notice of the scholars such agencies as may assist them in the continuation of their studies in after life. Dictionaries and atlases should be

equipped with the necessary apparatus, including desks, furniture, books, and maps; and, by art. 25 (*a*), defines a "public elementary school" to be "a school which is an elementary school within the meaning of section 3 of the Elementary Education Act, 1870, and satisfies the further conditions imposed by section 7 of the same Act."

By s. 24, sub-s. 1, of the Act of 1902 any expression to which a special meaning is attached in the Elementary Education Acts, 1870 to 1900, is to have the same meaning in the Act of 1902. Therefore "public elementary school," in s. 7, sub-s. 1, of the Act of 1902, must have the same meaning as in the Act of 1870; and it is clear from the provisions of the Act of 1870 and of the Code that a "public elementary school" means a properly equipped school.

Sir R. Finlay, K.C., and *Courthope Munroe*, in support of the rule. The contention of the other side is, in effect, that the local education authority acted ultra vires in taking over these schools because neither of them was a "school" within the meaning of the Act of 1902; and their argument must of necessity extend to everything that is required to make a school a going concern, that is, books, maps, and teachers. The consequences of that argument would be extravagant.

There is a material distinction with regard to St. Sebastian's School. Furniture had been provided by the promoters at the time when the school was opened which was used for some time before the local education authority substituted the new furniture, and the Board of Education subsequently recognized it as a "public elementary school" entitled to a grant during that time. In those circumstances it is impossible to say that this school was not a "school" within s. 7 of the Act of 1902 when the local authority supplied the new furniture.

Both these schools were provided under s. 8 of the Act as new "non-provided" schools, and all the conditions of that section were fulfilled. Under s. 8 all that is required to be done by the

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provided for the scholars in the higher classes. In cases where the school does not possess a school library, arrangements should be made to supply books for the reading of the scholars by co-operation with organisations existing for the purpose or otherwise."

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promoters is the provision of school buildings of which the Board of Education has approved. When that has been done, the obligation of the local education authority to "maintain and keep efficient" arises, and that obligation must include the provision of all necessary equipment. Sect. 7, sub-s. 1 (*d*), defines the extent of the liability of the managers of a non-provided school, which is to provide the schoolhouse free of charge and keep it in repair and to make such alterations and improvements in the buildings as the local education authority may reasonably require. The local education authority is bound to provide and pay for everything else that may be necessary to carry on the school: *Gillow* v. *Durham County Council.* (1) Clause 14 of Sched. II. to the Act of 1902 shews that the trustees or managers are not under any obligation to furnish a schoolhouse, but that they are only bound to permit the local authority to use furniture and apparatus which may be actually in use for the purposes of the school.

Cur. adv. vult.

March 29. BANKES J. The Court are not unanimous, and therefore it falls to my lot to deliver judgment first.

The questions which have arisen in this case have reference to two new schools erected by persons other than the local education authority. To use the ordinary expression with regard to these schools, they are "non-provided" schools. The one is called St. Sebastian's, the other St. Hugh's. All the necessary formalities prescribed by s. 8 of the Act of 1902 were complied with before the erection of these schools, and the plans of the proposed buildings were duly submitted to, and approved by, the Board of Education under art. 17 of the Code.

The schools were completed, and St. Sebastian's was opened on May 3, 1909, and St. Hugh's on September 6, 1909. At the time when St. Sebastian's was opened, the managers had supplied certain school furniture and apparatus, including desks, which, whether entirely satisfactory to the local education authority or not, were sufficient to enable the school to be carried on in fact without any alteration or addition until August 10,

(1) [1911] 2 K. B. 1074, 1084.

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1909. We have no materials supplied to us to enable us to come to any definite conclusion as to whether, if other furniture and apparatus had not been supplied to St. Sebastian's School, the Board of Education would have refused to place the school upon the grant list; but the Board did ultimately put this school upon the grant list as from the date of its opening, and therefore I think it must be assumed that the Board, at any rate, were satisfied with the furniture and apparatus as originally supplied by the managers.

Now it must be borne in mind that the provisions of the Code have to be complied with to the satisfaction of the Board of Education in order to enable a school to earn the parliamentary grant, and the Board have a certain discretion as to the extent to which they will enforce the various regulations of the Code, and it may well be that they may adopt a different standard with regard to school furniture from that which is adopted within the area of any particular local education authority. With regard to this particular furniture, it appears that the local authority found it to be unsuitable, and accordingly new furniture, the payment for which was disallowed by the auditor, was supplied by them. It seems to me impossible to say that, with regard to St. Sebastian's, the school was not in fact being carried on as a "public elementary school" at the time this furniture was supplied, and under those circumstances in my opinion the auditor was wrong in disallowing the payment for furniture and apparatus in respect of that school.

The case with regard to St. Hugh's is different because the managers never did supply any furniture or apparatus, but the local authority supplied the only furniture which was in fact ever placed in that school. It is said that the furniture and apparatus never having been supplied by the managers, that school had not become a "public elementary school" at the time of the supply of the furniture by the local education authority, and for that reason they had no statutory authority to apply any moneys to the maintenance or keeping efficient of such school. If my view is right in regard to St. Sebastian's, this contention would result in what appears to me to be an absurdity because the managers of St. Hugh's could have put themselves

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and the local education authority in order by taking the furniture which was removed from St. Sebastian's in August of 1909 and placing it in St. Hugh's before that school was opened and allowing it to remain there for so long as the local education authority thought proper, although they knew and the local authority knew that the furniture would not be allowed to remain there. I think that any reasonable construction of the statute which would prevent such an absurdity ought to be adopted.

The whole question as to the legality or illegality of these payments by the local authority turns upon the true construction of s. 7 of the Education Act, 1902. If there is any statutory authority for making the payments it must be found in that section. On the one hand it is contended that this section confers the necessary statutory authority, on the other that it does not.

Before discussing the language of the section it is necessary, I think, to ascertain what are the material statutory obligations of the managers and the local education authority respectively in regard to a non-provided public elementary school. It is, I think, plain that the statutory obligations of the managers are confined to (*a*) providing the schoolhouse free of charge for use as a public elementary school; (*b*) out of funds provided by them keeping the schoolhouse in good repair and making such alterations and improvements in the buildings as may be reasonably required by the local education authority (s. 7, sub-s. 1 (*d*), of the Act of 1902); and (*c*) permitting the use for purposes of the school of any school furniture belonging to the trustees or managers and in use for the purposes of the school before the appointed day (Sched. II., clause 14), the appointed day, by s. 27, sub-s. 2, being March 26, 1903. It is, I think, clear from the above provisions that there is no statutory obligation on the managers of a non-provided school to provide any furniture, and the obligation to permit the use of furniture which is owned by them is confined to furniture in existence and in use for the purposes of the school before the appointed day.

To turn now to the obligations of the local education authority. By s. 5 of the Act of 1902 they are responsible for and have the

control of all secular instruction in public elementary schools not provided by them. By s. 7, sub-s. 1, they have to maintain and keep efficient all public elementary schools within their area which are necessary, and they have the control of all expenditure required for that purpose other than expenditure for which under that Act provision is to be made by the managers; but in the case of a school not provided by them only so long as certain conditions and provisions are complied with, one of which is the condition as to the maintenance and repair of the schoolhouse by the managers to which I have already referred. These provisions are easy of application to a non-provided school which was in existence on the appointed day. With regard to any such school the furniture which was used in that school before the appointed day is furniture which the local authority are entitled to use, and if they consider that that furniture is not sufficient in order to maintain or keep the school efficient they are in my opinion clearly entitled to displace it and put in other furniture and apparatus.

The difficulty, however, arises in applying these provisions to schools of this class which have come into existence since the appointed day. The obligation of the local authority to maintain and keep efficient is confined to "public elementary schools," and it is contended, and on this the whole question turns, that the schools in question were not "public elementary schools" when the expenditure which is challenged was incurred. To ascertain what is meant by a "public elementary school" it is necessary to turn to ss. 3 and 7 of the Elementary Education Act, 1870. Sect. 3 defines an "elementary school" to mean "a school or department of a school at which elementary education is the principal part of the education there given." In my opinion that definition has reference to the character of the education which is given within any building and does not refer either to the construction or the equipment of the building. Sect. 7 provides that "every elementary school which is conducted in accordance with the following regulations shall be a public elementary school within the meaning of this Act." The combined definition is compendiously stated in art. 25 (*a*) of the Code, which states that "a public elementary school is a school which is an elementary

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school within the meaning of section 3 of the Elementary Education Act, 1870, and satisfies the further conditions imposed by section 7 of the same Act." These so-called "conditions" are spoken of in s. 7 itself as "regulations." They are four in number. The first two have reference to religious observance, religious instruction, and what I may call religious tests; the third has reference to the school being open to inspection by His Majesty's inspectors; the fourth has reference to the conduct of the school generally in accordance with the conditions required to be fulfilled by an elementary school in order to obtain an annual parliamentary grant. It is not contended that these schools did not at all times comply with the first three of these conditions or regulations, but it is contended that they did not comply with the fourth. Sect. 97 of the Act of 1870 lays down the conditions which are necessary to obtain a parliamentary grant, namely, "those contained in the minutes of the Education Department in force for the time being," that is to say, in what is known as the Code. In order to obtain a parliamentary grant, therefore, a school must fulfil all the conditions of the Code (see art. 26 (*a*)) whether they relate to the conduct of the school or not; but to be a "public elementary school" it is only necessary to comply with such of the provisions of the Code as relate to the conduct of the school: see s. 7, sub-s. 4, of the Act of 1870, to which I have already referred. The provisions of the Code seem to me to provide for two separate sets of requirements, those which deal with the provision of suitable buildings and equipment, and those which deal with the conduct of the school in such suitable buildings and with such suitable equipment. Art. 17 is clearly an instance of the first class, and the whole of chapters 1 and 2 of the Code deal with the second class. Some of the articles seem to include both classes, as for instance art. 18. Into which class does art. 20 fall? Art. 20 provides that the school must be adequately and suitably equipped with the apparatus requisite for its curriculum, including desks, furniture, books and maps, and goes on to say: [His Lordship read the rest of the article.] That article, as it seems to me, may be considered possibly as an article dealing with both classes. It certainly deals in its opening sentence with the equipment of the school. Later it

seems to contain instructions for teachers which are very wide and with regard to which the Board of Education may perfectly well accept a different standard with regard to different schools or different types of schools. If my view is right, that the Code contains the separate classes of provisions which I have indicated, it follows that a school may be a "public elementary school" provided it complies with all the provisions of the Code relating to the conduct of the school and yet may fail to be entitled to the parliamentary grant because it does not comply with the provisions as to buildings and equipment. The only condition with which it is said these schools failed to comply is that relating to the provision of the apparatus requisite for the curriculum. If this condition was not a regulation as to the conduct of the schools within the meaning of s. 7, sub-s. 4, of the Act of 1870, the contention of the auditor fails, because in all other respects the schools did comply with all the regulations laid down in s. 7, and were therefore "public elementary schools," and as such the local authority were not only entitled but were under a duty to maintain and keep them efficient, a duty which would clearly include the provision of the necessary apparatus and furniture.

Having regard to the circumstances, I think that it is not shewn that either of these schools was not a "public elementary school" at the time this expenditure was incurred, and upon this ground the auditor was wrong with regard to both schools.

For these reasons I think that the rule should be made absolute.

PICKFORD J. In this case the question arises with regard to two schools which have been built by persons other than the local education authority, and have been furnished with desks and cupboards by and at the expense of the local authority, that expenditure by the local authority having been disallowed by the auditor. The question is whether the auditor is right with regard to that disallowance. He has disallowed this expenditure substantially on the ground that neither of these schools at the time of the liability being incurred was a "public elementary school" in the sense that it complied with the

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description or definition of a "public elementary school" which is given in the Education Acts.

The question with regard to St. Sebastian's is different from that with regard to St. Hugh's, and I agree entirely with what has been said by Bankes J. with regard to St. Sebastian's. It seems to me that, even adopting the auditor's reasoning, that school was, at the time the expenditure was incurred, a public elementary school. It had been open for three months with some furniture in it provided by persons other than the local authority, and it was recognized, no doubt at a later date, by the Board of Education as a public elementary school as from the date of its opening on May 3, 1909. Therefore it seems to me that, whatever may be the construction of these sections, the disallowance of that expenditure must be wrong because this school was a public elementary school at the time when the liability was incurred.

With regard to St. Hugh's the question is different and much more difficult, because there was no furniture at all in the school at the time this expenditure was incurred, and, if s. 7 of the Education Act, 1902, is to be construed as meaning that there is no obligation upon the local education authority to maintain and keep efficient until the school has become in the fullest sense a public elementary school, I do not see what authority they had to expend this money upon this school. The difficult question to my mind is whether the sections are to be read in that sense. The difficulty arises from the fact that this particular case is not expressly dealt with anywhere in the Act. The case of schools provided by the education authority is specifically provided for in ss. 18 and 19 of the Act of 1870. Sect. 19 gives the power and perhaps imposes an obligation to build or acquire in other ways the school, and then to fit it up; and s. 18 provides that it shall be maintained and kept efficient. Therefore there is no difficulty with regard to those schools; but there is a difficulty with regard to schools which are provided not by the local education authority but by other persons and are called "non-provided" schools. Under the Act of 1870 no such question arose with regard to these schools because the school board had not to maintain them. The question arises under

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the Act of 1902, which placed upon the local education authority the obligation of maintaining all public elementary schools whether provided by them or not. The words of the Act, I say, do not expressly deal with this state of things; they are far more apt to deal with the ordinary case of a school at that time being carried on as a voluntary school and coming under the powers of the local authority. It may be that this case was not directly considered because it probably is not a case that very often arises. Probably there are not many schools which are now built by persons other than the local education authority; but there are some, and this question arises with regard to them.

This question turns upon ss. 7 and 8 of the Act of 1902. Sect. 7 begins by saying that "the local education authority shall maintain and keep efficient all public elementary schools within their area which are necessary." Those words "which are necessary" were inserted, as I take it, to free them of the obligation as to existing schools which were not necessary, and also to impose the obligation as to schools not then in existence which might be considered to be necessary. Sect. 7 goes on to provide that the local authority shall be responsible for non-provided schools only so long as the stated conditions and provisions are complied with. One of those conditions (*d*) is that the managers of the school shall provide the schoolhouse free of any charge to the local authority for use as a public elementary school, and at their own expense keep it in good repair and make such alterations and improvements in the building as may be reasonably required by the local authority. The provision of new schools is dealt with by s. 8, which enacts: [His Lordship read s. 8.] If the prescribed notices are properly given and there is no appeal, or the appeal is decided in favour of the persons proposing to build, then I think it must be taken that the school is to be considered necessary, and necessary for the purpose of being carried on as a public elementary school; but it is not, of course, at that time a public elementary school in the fullest sense of the definitions which are given. It is a "school"; it is so described in s. 8; and it is a school that has to satisfy the requirements as to building of the Board of Education. That being so, there

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is a "school" which is a school necessary to be carried on as a public elementary school, and it seems to me that under those circumstances there is no violence done to the language of s. 7 by reading it as providing that the local authority shall maintain and keep efficient that school as a public elementary school even although it may not at the present be carried on in such a way as to satisfy all the provisions in the definitions in the Acts. Sect. 7 seems rather to point to that construction because the only obligation that is laid upon the managers in the case of a non-provided school is that they shall provide the schoolhouse and keep it in repair, and there is no provision which lays upon them the obligation to provide the furniture. If that section can be read in the way in which I think it can, that is, as meaning that a school which is necessary to be carried on as a public elementary school shall be maintained and kept efficient as a public elementary school by the local education authority, then there is an obligation upon them to provide such things as are necessary, and, of course, there being that obligation, there is a permission for the expenditure which has been incurred in this case. It has not been disputed that if the local authority think the furniture to be insufficient in the case of a school which had been carried on as a public elementary school before the Act, they are perfectly at liberty to take out all that furniture and provide entirely new furniture for the school, and I cannot see that it is straining the language of the Act too much to read it in the sense in which I think it ought to be read, and that sense would justify the expenditure in this case upon these schools.

Therefore I agree that these disallowances are incorrect in both cases.

DARLING J. With regard to St. Sebastian's School, I agree with the judgments pronounced by Bankes and Pickford JJ. for the reasons which they have given, and therefore I will say nothing about that school.

With regard to St. Hugh's School, I have come to a different conclusion and think the auditor was right in disallowing this expenditure in regard to that school. The question arises in

this way. By s. 7 of the Education Act, 1902, the local education authority must maintain and keep efficient all public elementary schools within their area which are necessary. Those words "maintain and keep efficient" gave rise to the whole of this dispute. It is clear that they are to maintain and keep efficient; but the question is what they are to maintain and keep efficient. I think that the word "maintain" postulates the existence of the thing to be maintained and kept efficient. I think that what the managers provided, even if it could be called a "school," was not that which the local authority were bound to maintain and keep efficient, because they are bound to maintain and keep efficient only that which is properly described as a "public elementary school," and what the managers provided was nothing but the bare building, with no furniture nor anything which would lead one to say that it was obviously and necessarily a school. There is a difference, which appears in this very section, between a "school" and a "schoolhouse." What the education authority are bound to maintain and keep efficient is not the "schoolhouse" but the "school"; and clause (*d*) of s. 7, sub-s. 1, says that the managers of the "school" shall provide the "schoolhouse" and keep it in repair, so that the "school" is not the same as the "schoolhouse." These managers provided for the local authority only a bare schoolhouse. I think there is a distinction drawn in that very section between what the local authority are bound to maintain and keep efficient and the thing which in this case was actually built and provided by the managers. They built in consequence and by virtue of s. 8 of the Act of 1902, which has been already read. But in order to see whether that which the managers provided was a "public elementary school" or not, one has to look at the definition which is contained in s. 7 of the Elementary Education Act, 1870. That section says this: [His Lordship read the opening words.] The managers provided only a schoolhouse. One cannot "conduct" a schoolhouse; much more is required before one can conduct a school, and that only is a "public elementary school" within the meaning of the Act of 1870 which is conducted in accordance with certain regulations; if it is not conducted in accordance with those regulations it is not a "public elementary

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school," and in such case I think the local authority have no right to maintain it.

Sub-s. 4 of s. 7 of the Act of 1870 carries the matter a little further, because it says that the school shall be conducted in accordance with the conditions required to be fulfilled by an elementary school in order to obtain an annual parliamentary grant. It must be conducted in accordance with that regulation in order to be, not merely a school, but a "public elementary school" such as the local authority are bound to maintain. The definition of a "public elementary school" in the Act of 1870 is also the definition under the Act of 1902 (see s. 24, sub-s. 1).

What then is necessary in order to constitute a "public elementary school"? In order to see that we must look at the "Code of Regulations for Public Elementary Schools," and art. 20 reads thus: [The learned judge read it.] A "public elementary school" must, therefore, be adequately and suitably equipped with certain apparatus; and, if it is not so equipped, it is not in my opinion a school within s. 7 of the Act of 1902.

I think that the auditor was right in disallowing the expenditure upon furniture for St. Hugh's School—I am dealing only with that school—upon the ground that it was not expenditure upon maintaining a school, but upon creating a school, that is, upon converting what was merely a schoolhouse into a public elementary school, which is not, in my opinion, "maintaining" a public elementary school. To be logical, I think that the auditor should have gone further, but the fact that to be quite logical he ought to have done something more does not invalidate what he has done. This is merely obiter, though it seems necessary for my reasoning, but I think that he might well have disallowed also the expenditure upon books and maps and things of that kind, which are a necessary part of the apparatus required to constitute a "public elementary school."

For the reasons which I have given, I think that the decision of the auditor in respect of St. Hugh's School was right, and that this rule should be discharged; but as the majority of

the Court are of a contrary opinion the rule must be made absolute.

Rule absolute.

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Solicitors for respondent: *Sharpe, Pritchard & Co.*

Solicitors for applicant: *F. Venn & Co., for E. R. Pickmere, Liverpool.*

J. H. W.

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Feb. 20.

Revenue—Income Tax—Club—Fees received from Visitors—Profit or Gain—Method of Assessment—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *Sched. D, First and Sixth Cases.*

A club, an ordinary bona fide members' golf club, acquired land under a lease granted by a railway company. In addition to the members of the club, who were entitled on payment of their subscription to play on the links and to other privileges for the current twelve months, each full member might introduce a friend three times a year free of charge. A considerable number of visitors used the club-house and played on the links in accordance with a provision contained in the lease which provided that they should be allowed to play on payment of the green fees of 1*s.* 6*d.* per day, 5*s.* per week, or 10*s.* per month, as the case might be, or such other charges as the lessors might from time to time fix not less than the minimum amounts of 1*s.* 3*d.* per day, 4*s.* per week, or 10*s.* per month. The total annual expenditure incurred in maintaining the links in a condition fit to play golf upon exceeded the total amount of fees received from visitors.

The Commissioners for the General Purposes of the Income Tax Acts decided that the club was liable to assessment in respect of visitors' green fees less such proportion of the annual outlay in maintaining and keeping up the links and club-house as the visitors' contributions bore to the entire annual income of the club or fund available for the maintenance and upkeep:—

Held, that the club was carrying on an enterprise which was beyond the scope of the ordinary functions of the club, and as to which it was possible to keep separate accounts so as to ascertain whether there were any profits, and that any profits derived from the visitors' green fees were therefore taxable under Sched. D of the Income Tax Act, 1842.

Held, further, that the method of arriving at the amount of the taxable profits adopted by the Commissioners was erroneous, and that in default of agreement the case must go back to them to ascertain the amount of taxable income received by the club.

CASE stated under the Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 59, by the Commissioners for the General Purposes

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of the Income Tax Acts for the Division of Allerdale below Derwent in the county of Cumberland.

At a meeting of the Commissioners held on November 11, 1909, and adjourned to February 24, 1910, the appellants, the Carlisle and Silloth Golf Club, appealed against assessments of 66*l.* made under Sched. D of the Income Tax Act, 1842, for each of the two years ending April 5, 1909, and April 5, 1910, respectively in respect of profits from visitors based on the appellants' accounts.

The club was formed some years ago and was carried on under a constitution and rules made by its members in general meeting.

The club was not incorporated or registered under the Friendly Societies Acts. It was an ordinary bona fide members' golf club and was formed for the ordinary purposes of such a club, and in particular—

(*a*) For the provision and maintenance of golf links at Silloth for the club, together with a club-house, refreshment rooms, and other usual conveniences in connection therewith.

(*b*) To supply refreshments (including all kinds of alcohol and mineral waters) to members.

The objects for which the club was formed had been duly carried out, the club having acquired land under a lease granted by the North British Railway Company in 1903 to certain members of the club's committee of management as representing the committee, and an agreement in 1908 extending the lease, and in accordance with the provision hereinafter mentioned contained in the lease the club had erected a substantial club-house together with buildings used for locker rooms, ladies' room, professionals' room, lavatories, &c.

The lease contained (inter alia) the following provisions:—

Second. "The lessees shall in accordance with plans to be previously approved of by the lessors erect a new golf club-house in addition to or in substitution for the existing golf club-house and thereafter maintain it in good condition."

. . . . .

Fifth. "The lessees shall appoint the greenkeepers necessary to maintain the links in as good a condition as they are in at

present and during the period of this lease shall maintain and at the expiration of it leave the links in such condition."

. . . . .

Seventh. "The lessees shall allow non-members to play golf on the said links on payment of one shilling and sixpence per day, five shillings per week or ten shillings per month as the case may be, or on payment of such other charges as the lessors may from time to time fix, not being less than one shilling and threepence per day, four shillings per week or ten shillings per month."

. . . . .

Ninth. "The lessees shall pay to the lessors a nominal rent of twenty-one shillings per annum on the anniversary of the date hereof."

The committee responsible for the management of the club consisted of ex officio members and nine ordinary members to be elected at the annual general meeting by ballot.

The receipts in each year of the club consisted of—

(*a*) The subscriptions of members.

(*b*) Locker rents from members.

(*c*) Profits on the sales of the supplies of refreshments, alcohol and mineral waters appearing in the club's income account under the head of "Steward's Account."

(*d*) Green fees (being the receipts from visitors) appearing in the club's income account under the head of "Visitors' Tickets."

In addition to the members of the club, who were entitled on payment of their subscription to play on the links and to other privileges for the current twelve months, each full member might introduce a friend three times a year free of charge. A considerable number of visitors used the club-house and played on the links in accordance with the provision contained in the lease which provided that they should be allowed to play on payment of the green fees of 1*s.* 6*d.* per day, 5*s.* per week, or 10*s.* per month, as the case might be, or such other charges as the lessors might from time to time fix, not being less than the minimum amounts of 1*s.* 3*d.* per day, 4*s.* per week, or 10*s.* per month.

The fees during the years 1908 and 1909 were increased to

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2*s.* per day, 7*s.* 6*d.* per week, or 15*s.* per month, and the total amount received from visitors for the year 1905 was 177*l.* 4*s.*; 1906, 192*l.* 13*s.* 6*d.*; 1907, 204*l.* 11*s.*; and for the year 1908, 228*l.* 19*s.* 6*d.* The expenses necessarily incurred in each year in maintaining the club exceeded the amounts received from green fees from visitors. The expenditure incurred in maintaining the golf course alone (as distinct from the club-house and premises) was—

	£	*s.*	*d.*
For the year 1905 - - - -	256	2	7
„ „ 1906 - - - -	270	2	3
„ „ 1907 - - - -	269	15	3
„ „ 1908 - - - -	301	8	6

The contentions on behalf of the club were as follows:—

(*a*) That the club being an ordinary bona fide members' golf club and not an association carrying on the business of letting out golf links for profit was not liable to be assessed at all and, there being no evidence of the club trading or carrying on any business whatever, should not be assessed.

(*b*) That in any case there were no profits assessable as the total annual expenditure incurred in maintaining the links in a condition fit to play golf upon exceeded the total amount of fees received from visitors.

The respondent, a surveyor of taxes, contended (inter alia) that the club was in receipt of annual profits or gains which if not within case 1 of Sched. D clearly came within case 6 (1), which imposed liability on all "annual profits or gains" not falling under any of the foregoing rules and not charged by virtue of any other schedule.

It was not sought to assess any surplus arising from members' subscriptions. The visitors were not members of the club—they had no vote for the committee, were not admitted to the club

(1) Income Tax Act, 1842, Sched. D: "First Case—Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade, not contained in any other schedule of this Act."

"Sixth Case—The duty to be charged in respect of any annual profits or gains not falling under any of the foregoing rules, and not charged by virtue of any of the other schedules contained in this Act."

competitions, and were not elected in the same way as ordinary members—and it was contended that there was liability to assessment in respect of the proportionate part of the yearly surplus that arose from visitors' green fees, and *New York Life Insurance Co.* v. *Styles* (1) was cited. The assessment was calculated by taking from the total visitors' fees for the year such proportion of the total of all expenses applicable both to members and visitors as the visitors' fees bore to the total annual income of the club. It was further contended that the whole of the expenses could not be set against the visitors' fees because a large part of the cost of upkeep was due to members and would be incurred whether there were visitors or not.

The Commissioners decided that the club was liable to assessment in respect of visitors' green fees less such portion of the annual outlay in maintaining and keeping up the links and clubhouse as the visitors' contributions bore to the entire annual income of the club or fund available for the maintenance and upkeep, and reduced the assessments for the years ending April 5, 1909, and April 5, 1910, to 64*l.* and 59*l.* respectively.

The club (by its treasurer and a member of the committee) appealed.

Ryde, K.C., and *A. M. Latter*, for the appellants. The club makes no taxable profit. The receipts from the members' subscriptions do not alone cover the club expenses, nor do those from the visitors alone. It is suggested by the Commissioners that by combining the two classes of receipts a profit can be shewn. The club is conducted as an ordinary club for amusement without any question of profit as between the club and the lessors.

The club cannot be said to be engaged in any trade or manufacture or in any adventure or concern in the nature of trade within the meaning of the first case in Sched. D of the Income Tax Act, 1842. It exists solely for pleasure. By the admission of visitors a species of temporary partnership is established, as the whole concern becomes one common venture. The members of the golf club desire to obtain their golf as cheaply as possible, and they have therefore arranged with the North British Railway

(1) (1889) 14 App. Cas. 381.

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Company that they should be at liberty to admit visitors. Nor does the club make any annual profits or gains within the meaning of the sixth case of Sched. D of the Income Tax Act, 1842. An analogous case is that of two persons who engage a cab but do not share the expense of hiring it equally. Each person reduces his expense by joining the other, but neither makes a profit or gain. At the end of each year there is a deficit on the golf links so far as the visitors' subscriptions are concerned, and that deficit has to be made good by the members' subscriptions. No doubt, if the golf course could be regarded as a separate undertaking and the visitors' subscriptions resulted in a profit which was applied to the relief of the club expenses, that profit might be taxable income. The decision in *New York Life Insurance Co.* v. *Styles* (1) has no application. In that case it was admitted that the income derived by the company from transactions with persons not members was taxable. The only point decided was that the income derived from mutual insurances between members only was not liable to income tax. An aggregate of individual losses cannot result in a corporate gain. In the present case no profit can be shewn on the business done with non-members unless the proceeds of the business done with the members is brought into account. In *Grove* v. *Young Men's Christian Association* (2) the restaurant carried on by the association was making a profit. The association—viewed as an association—would have been poorer if they had not carried on the restaurant. In the present case if the club discontinued the golf course it would be richer. Suppose a person grows potatoes in his garden and by selling the surplus over his own requirements reduces his expenses, he would not make a taxable income. He has only reduced his loss. A social club does not trade nor is it carried on for profit. If the visitors were made members the case for the Crown would be unarguable.

Further, if there is any taxable gain, the method by which the Commissioners have arrived at the amount of it cannot be supported. The expenses attributable to the visitors cannot be ascertained by deducting, as the Commissioners have done, from the total expenses of the upkeep of the links a sum ascertained by

(1) 14 App. Cas. 381. (2) (1903) 4 Tax Cases, 613.

the proportion the receipts from the visitors bear to the total fund available for the upkeep of the links. There is no relation between the amounts. The subscriptions from members could be raised without altering the visitors' fees, and if that were done sufficiently it would make the fraction of the total expenses to be deducted from the visitors' fees so small that the visitors' fees would appear to be nearly all profit. The Commissioners have taken into consideration the expenditure of members upon members. [*Wise* v. *Perpetual Trustee Co.* (1) and *In re St. James's Club* (2) were also referred to.]

Sir Rufus D. Isaacs, A.-G., and *W. Finlay*, for the respondent. The question is whether the club carries on as regards the non-members the business of the proprietors of a golf course. If the club for consideration gives a licence to non-members or lets to them the right to come on to the golf course it makes a contract which enures for the benefit of the club. It carries on the business of a golf club proprietor. The fact that the obligation to carry on the business is imposed by the lessors makes no difference. The only question is whether a profit results to the club. The facts in the present case are closely analogous to those in *Grove* v. *Young Men's Christian Association.* (3) The fact that that which the club lets to the non-members is the surplus beyond its own requirements is not inconsistent with its carrying on a business. The club would have to keep the golf course in order even though it did not admit non-members, and the amount the non-members pay is therefore to a great extent profit to the club, as the expense of keeping the course in order is not greatly increased by their presence. It is true that the method by which the respondent has arrived at the expenses which he has allocated to the non-members is not scientific, but it is the most favourable mode to the appellants. In a case like the present the only practical method that can be applied of arriving at the proportion of expenses to be allocated to the non-members is a rough approximation. The same method is adopted with regard to gate money received from strangers by cricket or football clubs. The amount at which the gate money ought to be taxed is arrived at

(1) [1903] A. C. 139. (2) (1852) 2 D. M. & G. 383.
(3) 4 Tax Cases, 613.

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by allocating some portion of the club expenses to the gate money, and thus the amount which is the balance of profit is roughly arrived at. The test as to whether a concern is carrying on a business is whether it is receiving money and giving something for it. The sixth case of Sched. D of the Income Tax Act, 1842, includes carrying on a business in a very wide sense. It does not depend upon the question whether the business is detachable from the concern itself. Suppose a club in Pall Mall were to let seats to the public to view a procession, i.e., to non-members. The money the club so obtained would be taxable. So long as the club confined the letting of the seats to members and their friends there would be nothing outside the business of the club. But the moment the club extended its operations to non-members it would be carrying on business with them and profits made by means of that business would be taxable: *Dillon* v. *Corporation of Haverfordwest*. (1) It is true that there is a difficulty in arriving at the exact amount of that taxable profit, but it can be arrived at roughly, and the taxpayer cannot complain if the amount so arrived at is not greater than the exact amount would be, and he suffers no injustice.

Ryde, K.C., in reply. There is no obligation on the club to keep the golf course in order apart from the covenants in the lease. If the principle upon which the profits have been assessed is erroneous, the assessment ought to be quashed: *Assets Co., Ld.* v. *Forbes*. (2) The minimum amount of the fees to be charged to non-members is stated in the lease in order to protect the club, for it would be to the interest of the landlords the North British Railway Company to reduce the fees as much as possible in order to attract as travellers over their railway as many non-members as possible, while power is given to the railway company to fix the fees above a certain amount in order to protect the railway company by preventing the club raising them too high and thus diminishing the number of passengers. *Dillon* v. *Corporation of Haverfordwest* (1) is distinguishable. In that case there was an antecedent liability on the corporation to light the streets. In the present case there is no contractual liability on the club to play golf.

(1) [1891] 1 Q. B. 575. (2) (1897) 3 Tax Cases, 542.

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HAMILTON J. In this case the Carlisle and Silloth Golf Club appeals from a decision of the Commissioners of Income Tax that the club was liable to be assessed in respect of visitors' green fees, the net amount of the assessment being arrived at in a particular way.

The golf club was formed some time ago and is a bona fide club of the ordinary character formed especially for the purposes of recreation and objects incidental thereto. It is not incorporated, but is simply an association of gentlemen who have become members of the club. The golf club course is laid out on some links which are held under a lease from the North British Railway Company, and by the terms of that lease the consideration from the lessees to the lessors consists in the main of covenants to be performed as distinguished from the payment of a substantial rent. The rent is a nominal rent of a guinea a year, but there are covenants to lay out and maintain a golf course and covenants, which have apparently been performed at considerable expense, to erect a pavilion or clubhouse. There is further an obligation to appoint greenkeepers in order to maintain the links in as good a condition as they are in at present, and during the period of the lease an obligation to maintain the links, and at the expiration to leave them in such good condition. There is further this important obligation in clause 7: "The lessees shall allow non-members to play golf on the said links on payment of one shilling and sixpence per day, five shillings per week or ten shillings per month as the case may be, or on payment of such other charges as the lessors may from time to time fix, not being less than one shilling and threepence per day, four shillings per week or ten shillings per month."

There is nothing in the lease or in the agreement which extended the term of the lease to entitle the lessees to object to any particular class of the public if it is willing to pay the fees in question and to conduct itself properly upon the golf course. We therefore start with the consideration that the necessity imposed upon the members of the club of allowing non-members to enjoy the advantages it offers is imposed upon the club by its lessors for reasons which are obvious and reasonable in

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themselves and which are sufficient for the purposes of both sides. The club thinks it worth while to admit strangers and to take the lease on these terms, and the lessors think it to their advantage to make this stipulation.

Enough visitors avail themselves of this privilege to produce a substantial sum of money per annum payable to the golf club. The figures are set out in the case. They reached in 1908 a maximum of 228*l.* 19*s.* 6*d.* By his assessment the surveyor of taxes claimed to assess the golf club as upon its annual profits or gains either within case 1 or within case 6 of Sched. D in the Income Tax Act, 1842.

The first question is whether in the circumstances the club carries on any concern or business in respect of which it receives remuneration that is assessable. Whether there are any profits or gains derived from that business is another matter, but can it be said to carry on something which can be called a business for the special purposes of income tax duty? I think on the whole I must decide that it does. The position is, that in order to acquire the links upon which to obtain its recreation, the club submits to admit strangers upon payment by them, and to maintain the golf course so that strangers can play upon it. It is quite true that these are obligations to the railway company and not to the strangers themselves. It is quite true that there is no reference to strangers in the covenant to maintain, but at the same time as a condition of having their golf course the club has not only to admit strangers, but to keep the course in a condition which will make it worth while for strangers to seek to be admitted.

The next point which has to be noticed is that the strangers are to pay green fees for the benefits that they enjoy. They are admitted to the club-house as well as to play upon the course, and that seems to me to be a feature outside the ordinary scope of that which this club is found to be, namely, an ordinary bona fide members' club. It is no doubt part of the functions and activities of the members of the club to entertain strangers, but not to entertain strangers who pay their own expenses; the strangers are the guests of the club or are introduced by and are the guests of members of the club. It is therefore quite a

special feature in the course pursued by this club that it should have a class of visitors entitled as of right to the enjoyment of most of its advantages upon payment made by them to the club although they are not members and although they may come from classes of the public from which it is not the object of the club to recruit its membership. The advantage of the arrangement to the club is obvious. The club is enabled to come to terms with the landlords for the acquisition of a desirable site which they otherwise would not be minded to let to the club, and there is the incidental advantage that a revenue accrues which is relatively not inconsiderable and is applied for the purposes of the club towards its general expenditure.

In my judgment this constitutes the carrying on of an enterprise which is in itself outside the scope of the ordinary functions of the club and distinct from its ordinary objects and activities. The amount of green fees to be paid by visitors is fixed by the lessors from time to time, subject no doubt to a minimum which is a protection, so far as it goes, to the lessees, but there is no direct relation between the green fees mentioned in the lease and the cost price actually ascertained of the entertainment that the visitors receive. The minimum may be fixed by some reference to what is supposed to be the sum that it costs the club to admit these visitors, but the fees actually charged are in excess of it and are presumably fixed by reference to considerations which affect the lessors, and not merely considerations that affect the burden which is imposed upon the lessees. In my judgment, therefore, the club has, for considerations sufficient in its own view, annexed to its ordinary enterprise of a golf club systematic services to strangers for the purpose of obtaining, among other advantages, the revenue that those strangers provide. It is not a case where, owing to relations of membership or family bonds, persons club together and reduce the common expenditure on some common object by contributions which they fix roughly with some reference to the cost. It is not a case in which the members as an aggregate (for they are not incorporated) dispose of their surplus because they have no necessity to consume it, but it is a case in which this aggregate of gentlemen, who may for practical purposes be treated as one person, have

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annexed to their club for the purposes of recreation an enterprise which is separate from it and which results in pecuniary receipts to themselves.

That, however, is not conclusive, because in ordinary circumstances before it could fairly be said that something is being carried on which could be called a business and which would be assessable in respect of its profits or gains (I do not use "business" in any technical sense) it would be necessary to find that something is being done as to which it is possible to keep separate accounts so as to ascertain whether there are profits or gains or not; and further it would be necessary to ascertain that there are profits and gains in fact. As to the amount of the profits and gains very cogent criticisms upon the mode in which the quantum of the assessment has been arrived at have been addressed to me on behalf of the appellants, and I have been invited to draw the conclusion that nothing is carried on which is severable from the general business or enterprise of the club, and that this entertainment of strangers in return for green fees is a separate matter merely in appearance and not in reality. To a large extent I agree with the criticisms on the mode of converting the gross revenue derived from visitors' tickets into a net profit or gain derived from the entertainment of visitors, and I think that there has been no proper comparison of the cost of earning the green fees with the green fees themselves and no proper dissection of the general overhead charges of the club for the purpose of attributing to the earning of the green fees the proportion of the club's outlay which in fact goes to the earning of that remuneration. Instead of that, a rule—I do not call it a principle—has been adopted which is expressed in these words: "less such portion of the annual outlay in maintaining and keeping up the links and club-house as the" visitors' contributions bear "to the entire annual income of the club or fund available for the maintenance and upkeep." That in the circumstances is a very natural method for a surveyor to adopt and to submit to a taxpayer for the purpose of seeing whether he will contest, discuss, or accept it, but it is in truth an evasion of the problem rather than an attempt to grapple with it. There is no necessary connection and little or no real relation between the gross fund

available for the maintenance and upkeep of the club and the mode in which that fund is made up by contributions under varying circumstances and conditions from varying classes of persons.

These considerations are not, however, at all conclusive as to the first question, whether there is a separate business or concern carried on by the club, although they do bear upon the question whether the club makes any profits or gains. If it were worth while to incur the expense, it would be possible, by taking the experience of the working of this or similar clubs over a period of years and by examining the number of persons of each class using the club and the links and the times of the year at which they do so and the numbers at particular times in which they congregate together, to ascertain with real arithmetical accuracy what proportion of the club's gross expenditure upon house and grounds is truly attributable to the user by the visitors in respect of which the green fees are receivable. It is not impossible upon the accounts to sever this part of the club's enterprise from the remainder, but it is difficult and probably unreasonably expensive. I, however, think that it could be accomplished. That part of the club's enterprise is capable of being isolated and defined, and that which is prima facie, having regard to the lease and the constitution of the club, a separate enterprise is also capable of being defined, as a separate enterprise.

The remaining question is whether the club in fact makes any profits or gains. It is said that the green fees alone would not nearly keep up the course and the club-house which the visitors enjoy, nor would the members' subscriptions without the visitors' green fees keep up the course and the club-house; that in either of those aspects the club would every year have a heavy deficit. By combining the two there is a less deficit, though there is still a deficit, because the difference between the receipts and expenditure has to be made good by members' subscriptions. It is perhaps an overstatement to speak of a deficit in these circumstances, because presumably the members obtain their quid pro quo for their subscriptions, but no doubt it is true that the receipts from the coffee room for refreshments or from the lockers or the visitors' tickets and other sources would not be nearly sufficient to maintain the club in the condition in which

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it is maintained, but that is not sufficient to shew that the Commissioners should have treated this undertaking as one in which no profits or gains were earned. There is little doubt that the inference is more one of fact from admitted circumstances than one of law. There is none that this club exists for the members and not for business purposes, and that it was formed and is maintained in order that the members might have a suitable course and pavilion for the purpose of their recreation. The visitors' part of the entertainment is a subordinate and an additional department which the club is required to institute and carry on by the terms of its lease, and from which by the terms of its lease it extracts a substantial and, it is to be hoped, a satisfactory return. But it is impossible to say on these facts alone and without further investigation that there is no profit or gain merely because it is apparent upon the figures that if there were no members and all were visitors the visitors would have to play upon the ground in its unprepared condition and dispense with the club-house altogether. In fact there is a club, a club-house, and a golf course laid out upon the links, and the visitors obtain the advantage of playing upon it upon specific terms not at all directly connected with the cost price of their entertainment. I am therefore unable to hold upon the facts before me that the Commissioners were wrong in assuming that there was some profit or gain made.

The remaining question is whether the Commissioners were right in their decision with regard to the assessment. I do not propose to go into any question involving mere facts and figures in that connection, but the Commissioners have stated that the method which they applied was to deduct from the visitors' green fees "such portion of the annual outlay in maintaining and keeping up the links and club-house as" the visitors' contributions bear "to the entire annual income of the club or fund available for the maintenance and upkeep." It is sufficiently apparent that the Commissioners have resorted to that so-called principle because of the difficulty of reducing the gross green fees to a net amount in anything like the exact manner of accountancy, and I cannot draw the conclusion that they have investigated figures and facts and have found that

the true profit is, by a coincidence, the amount that would be ascertained by the application of this somewhat irrelevant rule of three sum. I must take the Commissioners as meaning that in the circumstances, in default of a better rule, this is the right one to apply. It seems to me to be an arbitrary method having no necessary application to the facts, and therefore one which in my judgment it is not right to apply.

It was contended on behalf of the surveyor of taxes that it is unnecessary to dissent from the Commissioners' decision because so far as the amount goes it is as favourable to the subject as it can be whatever method is adopted; and it was suggested that possibly the gross amount of the green fees would be the sum in respect of which the assessment should be made, because there is no finding that the whole of the items on the debit side would not have been incurred in respect of the members even if there had been no visitors. I need not decide that question because it is not before me; but I should hesitate long before I accepted the argument. It appears to me that the assessable profits must be the real profits—the net profits—and that the amount of those profits can only be arrived at by ascertaining whether there is not, as one certainly would expect there would be, something to come off the gross before arriving at the net sum. The appellants say that if the appeal is not allowed in toto the case ought to go back to the Commissioners to ascertain what the net and true profits or gains may be, and I think I ought to give the appellants this opportunity, expressing, however, a hope that when the difficulty and the nicety of this calculation comes to be compared with the monetary advantage that is likely to accrue from it, the parties may either agree to accept the present illogical rule or some other rule more satisfactory if not more logical.

Appeal dismissed. In default of agreement case remitted to the Commissioners to ascertain the amount of taxable income received by appellants.

Solicitors for appellants: *James & James, for Clutterbuck, Trevenen & Steele, Carlisle.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

J. E. A.

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Feb. 21, 22.

ATTORNEY-GENERAL *v.* PEEK AND OTHERS.

Revenue—Estate Duty—Settlement Estate Duty—Advowson—Proceeds of Sale—Succession Duty Act, 1853 (16 & 17 *Vict. c.* 51), *s.* 24—*Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 15, *sub-s.* 4.

Neither estate duty nor settlement estate duty is, under the Finance Act, 1894, payable upon the principal value of an advowson or upon the proceeds of the sale thereof.

INFORMATION at the suit of the Attorney-General on behalf of His Majesty praying for a declaration that certain estate duty and settlement estate duty were payable upon the principal value of certain advowsons or upon the proceeds of the sale thereof respectively.

The defendants to the information were Sir Wilfred Peek, Baronet, the tenant for life in possession under the will of the late Sir Henry William Peek, and the trustees of the will.

The material facts (which were not disputed by the defendants) alleged in the information were as follows:—

By his will, dated May 13, 1898, Sir Henry William Peek, of Rousdon, in the county of Devon, Baronet, deceased, after appointing his son Cuthbert Edgar Peek (afterwards Sir Cuthbert Edgar Peek, Baronet, and since deceased) to be the sole executor thereof, and appointing the defendants other than Sir Wilfred Peek, Baronet, to be the trustees thereof, devised certain lands and hereditaments, the advowson of the parish of Rousdon and all rights thereto belonging, the advowson of the parish of Drewsteignton in the county of Devon and all rights thereto belonging, and the advowsons of the parishes of Cranleigh in Surrey and St. Magnus, London Bridge, E.C., and all rights thereto belonging to the use of his said son Cuthbert Edgar Peek during his life without impeachment of waste, with remainder to the use of his (the testator's) grandson the defendant Sir Wilfred Peek during his life without impeachment of waste, with remainder to the use of the defendant Sir Wilfred Peek's first and every other son severally and successively according to seniority in tail male with divers remainders over. And the testator declared that during the subsistence of the settlement thereby made of the

premises the trustees thereinbefore appointed or other the trustees for the time being of his will should have a power of sale over the premises except the several advowsons thereinbefore mentioned, and also that the trustees should in connection with the settled premises be trustees for the purpose of the 42nd section of the Conveyancing and Law of Property Act, 1881.

The testator died on August 26, 1898, and his will was on November 15, 1898, duly proved in the Principal Probate Registry by his son Sir Cuthbert Edgar Peek, the executor therein named.

The estate duty payable upon the aggregate net value of the testator's personal and real estate which passed on his death (other than the advowsons) was duly paid, and the settlement estate duty which became payable as on the testator's death upon the principal value of the real estate other than the advowsons was also duly paid.

Sir Cuthbert Edgar Peek died on July 6, 1901, and thereupon the defendant Sir Wilfred Peek became tenant for life in possession under the limitations contained in the will. All estate duty which became payable on the death of Sir Cuthbert Edgar Peek on the aggregate net value of his personal and real estate which passed on his death was duly paid.

At the date of the death of Sir Cuthbert Edgar Peek no sale had been made of the advowsons, nor was either advowson included in any estate duty account which was rendered in connection with his death. On October 9, 1905, the defendant Sir Wilfred Peek attained the age of twenty-one years.

On March 8, 1909, the defendant Sir Wilfred Peek as tenant for life under the will, by virtue of the powers conferred upon him by the Settled Land Acts, 1882 to 1890, sold and conveyed to a purchaser and his heirs the advowson of Drewsteignton and the rights and appurtenances thereunto belonging, to hold the same unto and to the use of the purchaser, his heirs and assigns, in consideration of the sum of 1840*l.* 10*s.* which was duly paid by the purchaser to the defendants the trustees of the will.

On August 6, 1909, the defendant Sir Wilfred Peek as tenant for life under the will sold and conveyed to a purchaser and his

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heirs the advowson of the parish of Cranleigh, to hold the same unto and to the use of the purchaser in fee simple discharged from all the limitations, trusts, powers, and provisions affecting the same under the will in consideration of the sum of 1450*l.* which was duly paid by the purchaser to the defendants the trustees of the will.

The information alleged that in the circumstances hereinbefore appearing estate duty at the rate of 7 per cent. and settlement estate duty at the rate of 1 per cent. became under the provisions of the Finance Act, 1894 (57 & 58 Vict. c. 30), and the Finance Act, 1896 (59 & 60 Vict. c. 28), payable as on the death of either Sir Henry William Peek or alternatively Sir Cuthbert Edgar Peek upon the respective sums of 1840*l.* 10*s.* and 1450*l.* or (alternatively) upon the principal value as at the death of either Sir Henry William Peek or (alternatively) Sir Cuthbert Edgar Peek of the respective advowsons of Drewsteignton and Cranleigh.

The Commissioners of Inland Revenue had applied to the defendants as the persons accountable to deliver accounts of the advowsons of Drewsteignton and Cranleigh and/or the respective proceeds of sale thereof and to pay the estate and settlement estate duties, but the defendants refused to deliver any such accounts or to pay any part of the duties, and they contended that no such duties were payable. The Attorney-General accordingly prayed on behalf of His Majesty (inter alia) that it might be declared that the duties were payable.

Sir Rufus D. Isaacs, A.-G., and *Austen-Cartmell*, for the informant. The effect of s. 15, sub-s. 4, of the Finance Act, 1894, coupled with s. 24 of the Succession Duty Act, 1853 (1), is

(1) Succession Duty Act, 1853, s. 24: "A successor shall not be chargeable with duty in respect of any advowson or church patronage comprised in his succession, unless the same, or some right of presentation, or some other interest in or out of such advowson or church patronage, shall be disposed of by or in concert with him for money or money's worth, in which case he shall be chargeable with duty upon the amount or value of the money or money's worth, for which the same or any such presentation or interest shall be so disposed of, at the time of such disposal."

Finance Act, 1894, s. 1: "In the case of every person dying after the commencement of this part of

that immediately the advowson was sold the estate duty claimed became payable. The duty is payable out of the corpus, i.e., the proceeds of the sale: *Attorney-General* v. *Earl of Sefton*. (1) By s. 1 of the Finance Act, 1894, all property passing on death, with certain exceptions, is made chargeable with estate duty, and by s. 7, sub-s. 5, the principal value of any property shall be estimated to be the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased. Sect. 22, sub-s. 1 (*f*), enacts that "the expression 'property' includes real property and personal property and the proceeds of sale thereof respectively . . . ."

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this Act, there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty, called 'estate duty,' at the graduated rates hereinafter mentioned, and the existing duties mentioned in the First Schedule to this Act shall not be levied in respect of property chargeable with such estate duty."

Sect. 5, sub-s. 1: "Where property in respect of which estate duty is leviable, is settled by the will of the deceased, or having been settled by some other disposition passes under that disposition on the death of the deceased to some person not competent to dispose of the property,—

"(*a*) a further estate duty (called settlement estate duty) on the principal value of the settled property shall be levied at the rate hereinafter specified, except where the only life interest in the property after the death of the deceased is that of a wife or husband of the deceased; but

"(*b*) during the continuance of the settlement the settlement estate duty shall not be payable more than once."

Sub-s. 2: "If estate duty has already been paid in respect of any settled property since the date of the settlement, the estate duty shall not, nor shall any of the duties mentioned in the fifth paragraph of the First Schedule to this Act, be payable in respect thereof, until the death of a person who was at the time of his death or had been at any time during the continuance of the settlement competent to dispose of such property."

Sect. 15, sub-s. 4: "Estate duty shall not be payable in respect of any advowson or church patronage which would have been free from succession duty under section twenty-four of the Succession Duty Act, 1853."

Sect. 22, sub-s. 1 (*f*): "The expression 'property' includes real property and personal property and the proceeds of sale thereof respectively and any money or investment for the time being representing the proceeds of sale."

(1) (1865) 11 H. L. C. 257.

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The result is that if property is settled estate duty becomes payable prima facie upon the then value of the settled property. Estate duty having been paid in respect of the settled property on the death of the testator Sir Henry William Peek, the effect of s. 5, sub-s. 2, of the Finance Act, 1894, was that the settled property which passed on the death of Sir Cuthbert Edgar Peek was freed from any further estate duty. But any part of the settled property upon which estate duty was not paid on the death of Sir Henry became liable to the duty on the death of Sir Cuthbert. By s. 8, sub-s. 4, Sir Wilfred and the trustees of the will are accountable for the estate duty, and by s. 9, sub-ss. 6 and 7, it is ultimately payable out of the property in respect of which it is paid, and not by the tenant for life personally. By s. 4 all the property passing on the death of the deceased has with certain exceptions to be aggregated in order to determine the rate of estate duty. There is nothing in the Acts which makes an advowson an estate in itself. If, therefore, an advowson becomes liable to duty there must be a fresh aggregation, the result of which may be to reopen the accounts which have been passed by the Commissioners. Sect. 8, sub-s. 4, makes the person to whom property passes on the death of the deceased liable for the estate duty in respect of such property if the executor is not accountable for it, and s. 9, sub-s. 1, makes the duty a first charge on the property. By s. 11, sub-ss. 1 and 2, a person accountable for estate duty is empowered to apply to the Commissioners for a certificate of discharge from any further claim for estate duty on the conditions mentioned in the sub-sections, which in substance amount to the Commissioners being satisfied that all estate duty has been or will be paid in respect of the property, and by s. 8, sub-s. 7, if the certificate of discharge is given and it is afterwards discovered that for any reason too little duty has been paid, the additional duty which would otherwise be treated as duty in arrear is not to be paid.

The question in the present case turns upon the true construction of s. 15, sub-s. 4, of the Finance Act, 1894. The language of the sub-section implies that there may be an advowson in respect of which succession duty is payable under s. 24 of the Succession Duty Act, 1853. In that case estate duty is to

be payable under the Finance Act, 1894. If s. 15, sub-s. 4, had been intended to free all advowsons from estate duty it would have said so in plain language. Sect. 24 of the Succession Duty Act, 1853, consists of two parts. The first part enacts that "a successor shall not be chargeable with duty in respect of any advowson or church patronage comprised in his succession, unless the same, or some right of presentation, or some other interest in or out of such advowson or church patronage, shall be disposed of by or in concert with him for money or money's worth." That part of the section shews that an advowson is to be chargeable with succession duty if it is sold. The second part of the section, which enacts that "in which case he shall be chargeable with duty upon the amount or value of the money or money's worth, for which the same or any such presentation or interest shall be so disposed of at the time of such disposal," defines the manner in which the duty is to be exacted. For the purposes of the present case it is not necessary to rely upon the second part of s. 24 of the Succession Duty Act, 1853, for estate duty is sufficiently charged by the Finance Act, 1894. Sect. 24 of the Act of 1853 creates an exception as to succession duties upon real estate. Sect. 21 of the Act of 1853 enacts that the annual value of real property is to be the basis upon which the quantum of succession duty payable in respect of the property is to be ascertained. Sects. 22, 23, 25, and 26, which respectively contain the rules as to the valuation and succession duty chargeable upon agricultural lands, houses, &c., timber, property subject to beneficial leases, and manors, mines, &c., are exceptions to s. 21. The advowson itself is the subject upon which the succession duty is charged, but the mode in which the amount of the duty is ascertained is by reference to the amount of the proceeds of the sale. An advowson is therefore excepted from the operation of the general enactment contained in s. 21 of the Act of 1853, and succession duty becomes payable upon the advowson when it is sold, the fact that it produces no annual value as an advowson being immaterial. That view was taken in *Attorney-General* v. *Earl of Sefton*. (1) Although in the case of an advowson s. 24 of the

(1) 11 H. L. C. 257.

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Act of 1853 indicates the means by which the amount of the succession duty is ascertained, it is the advowson itself which is chargeable. Therefore the same general principle underlies s. 15, sub-s. 4, of the Finance Act, 1894, and s. 24 of the Succession Duty Act, 1853, as to the chargeability of an advowson. An advowson is included in the general charging provisions upon property contained in the Finance Act, 1894. It is therefore for the subject to shew that it is within some exception contained in the statute. The words "in concert" in s. 24 of the Succession Duty Act, 1853, shew that that section applied to the case of an advowson being settled. The form of settlement of real property before the Settled Land Act, 1882, came into operation under which a sale would take place in concert with the tenant for life was quite usual. In the present case it is immaterial whether the duty is considered as payable upon the value of the advowson at the date of the death of Sir Henry or Sir Cuthbert, but convenience suggests that the account in respect of the death of Sir Henry should be closed and that the duty should be payable upon the value of the advowson as at the date of the death of Sir Cuthbert and not of Sir Henry.

Danckwerts, K.C., *Dighton Pollock*, and *Devonshire*, for the defendants. There is no obligation on the defendants to pay any estate or settlement estate duty. The effect of s. 15, sub-s. 4, of the Finance Act, 1894, is to exempt advowsons from the duty, not to postpone payment of it. In every case where by a Revenue Act the payment of duty has been postponed or made payable separately special provision has been made by the statute as to its payment, e.g., as to an interest in expectancy by s. 7, sub-s. 6, and as to property in which the deceased never had an interest or which passes on a disposition not made by him by ss. 4 and 17 of the Finance Act, 1894, and another instance as to postponement is contained in s. 20 of the Finance Act, 1896 (59 & 60 Vict. c. 28), which deals with objects of national, scientific, or historic interest. In the case of an advowson there is no provision shewing how the value upon which duty is to be charged is to be arrived at. It is admitted by the informant that no duty was leviable upon the advowsons at the time of the deaths of Sir Henry and Sir Cuthbert, and the judgment of

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Lord Alverstone C.J. in the Divisional Court in *Rex* v. *Special Commissioners of Income Tax* (1) shews that where there is an exemption it must always be liberally construed in favour of the subject. The decision in that Court was affirmed in the Court of Appeal. (2) The words "advowson or church patronage" in s. 15, sub-s. 4, of the Finance Act, 1894, are taken from s. 24 of the Succession Duty Act, 1853, which applied to Scotland as well as to England and Ireland. The words "church patronage" in s. 24 of the Act of 1853 referred to Scotland. Church patronage in Scotland was abolished by ss. 2, 3, and 4 of the Church Patronage (Scotland) Act, 1874 (37 & 38 Vict. c. 82). Therefore at the time the Finance Act, 1894, was passed there was nothing in existence to which the words "church patronage" could apply. That shews that s. 15, sub-s. 4, of the Act of 1894 was not very carefully drafted. Its main object was to exempt, not to tax. *John London* v. *Chapter of Southwell* (3) shews that an advowson is not a thing of profit. In Phillimore on Ecclesiastical Law, 2nd ed., p. 269, it is stated to be a mere trust. It cannot be sold when the living is vacant. In Blackstone's Commentaries, vol. ii., p. 21, it is stated to be an incorporeal hereditament. Sect. 1 of the Succession Duty Act, 1853, shews that for the purpose of that Act an advowson is real property. The object of s. 24 of that Act was to prevent s. 21 applying to an advowson, as if it had applied there would have been no succession duty payable in respect of an advowson inasmuch as it is incapable of producing any income to the owner. The decisions in *Baron Wolverton* v. *Attorney-General* (4) and *Duke of Northumberland* v. *Attorney-General* (5) shew that the true successor is not necessarily the devisee of property, but the person into whose possession it finally falls. Sect. 24 of the Succession Duty Act, 1853, only applies where there is a succession. It only applies to an advowson where a single person becomes the owner of the whole advowson. It does not apply where there are successive interests in the advowson. The advowson itself is not made liable to the succession duty,

(1) (1908) 98 L. T. 446.
(2) (1909) 100 L. T. 585.
(3) (1618) Hob. 303.
(4) [1898] A. C. 535.
(5) [1905] A. C. 406.

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but only the proceeds of the sale. In the present case no one has taken the whole advowson. The distinction between legacy or succession duty and estate duty appears from *Winans* v. *Attorney-General* (1), and it is clear that estate duty is not based on the same principle as succession duty. There is nothing in the Finance Act, 1894, which shews that an advowson is liable to estate duty. The meaning of s. 15, sub-s. 4, of the Finance Act, 1894, is that advowsons are to be free from estate duty just as they were free from succession duty under the Succession Duty Act, 1853. The judgment of Lord Cairns in *Partington* v. *Attorney-General* (2) shews that if the Legislature, in a taxing statute, has made a mistake, the subject is entitled to take advantage of it. Sect. 6 of the Finance Act, 1894, shews that the scheme of the Act is that the whole of the taxable estate shall be valued as at the time of the death upon which it passes, and the estate duty carries interest from the date of the death. In the present case it can hardly be contended that the estate duty can carry interest. That tends to shew it is not within the scheme of the Act. Where there is so much doubt and so much difficulty in bringing the estate duty into the scheme of the Act, the subject is entitled to the benefit of the doubt. Sect. 61, sub-s. 5, of the Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), contains an additional illustration of the principle that when payment of duty is postponed by a revenue statute provision is always made as to how it is to be payable. The effect of s. 15, sub-s. 4, of the Finance Act, 1894, is that the burden of proof is upon the Crown. The mere fact that the words in the sub-section "which would have been free" have no operation is not sufficient to impose a tax. One meaning of the words is that if at the time of the collection of the succession duty on the rest of the estate the advowson is free from the succession duty it is free from the estate duty, and once free it is always free. On general principles and on the language contained in the enactments no estate duty is payable in the present case.

Austen-Cartmell in reply. All property passing on the death of the deceased is charged with estate duty by the Finance Act,

(1) [1910] A. C. 27. (2) (1869) L. R. 4 H. L. 100.

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1894, and by s. 22, sub-s. 1 (*f*), of the Act the expression "property" includes the proceeds of sale thereof. The proceeds are therefore in terms made liable to the duty. The estate duty does not become payable until the advowson is sold. The expression "is leviable" in s. 4 of the Finance Act, 1894, is not confined to estate duty which is leviable at the time of the death of the deceased. It fixes the rate of duty chargeable on the sale of the advowson. Sect. 11 provides a method by which a person accountable who feels a difficulty in fixing the value of the advowson can obtain relief. It is not necessary to rely on the latter part of s. 24 of the Succession Duty Act, 1853, because by s. 22, sub-s. 1 (*f*), of the Finance Act, 1894, the expression "property" includes real property and the proceeds of the sale thereof. Logically the date of Sir Henry's death would seem to be the date as from which the duty became payable, but convenience suggests the death of Sir Cuthbert. In the present case, however, the question is immaterial. [*In re Scott* (1), s. 8, sub-ss. 3 and 7, s. 12, and s. 13, sub-s. 1, of the Finance Act, 1894, and s. 18, sub-s. 1, of the Finance Act, 1896, were also referred to.]

HAMILTON J. The facts in this case are not to any material extent in dispute. Sir Henry Peek, who died in 1898, by his will, made a few months before his death, appointed three of the defendants trustees and settled considerable property, including the two advowsons in question, to the use of his son Cuthbert during his life, with remainder to the use of his grandson Wilfred, the present baronet and one of the defendants, during his life, with remainder to his first and other sons successively in tail male, with remainders over. Upon the death of Sir Henry in 1898 his son Cuthbert succeeded to the baronetcy, but died in 1901. His grandson Wilfred then succeeded to the baronetcy and attained the age of twenty-one in 1905. In 1909, under the powers conferred by the Settled Land Act, 1882, he sold the two advowsons in question for a considerable sum, and the Crown claims a declaration that the defendants, upon the death of either Sir Henry or Sir Cuthbert Peek, became liable to pay estate duty

(1) [1901] 1 K. B. 228.

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and settlement estate duty in respect of these advowsons, and claims accounts and payment accordingly. During the arguments considerable discussion took place upon the question whether the death upon which the estate duties in question arose was the death of Sir Henry or that of Sir Cuthbert, and at one stage of the argument for the Crown the death of Sir Cuthbert appeared to be chosen, but at a later stage that of Sir Henry. It is, however, agreed that it makes no difference to the practical result of this case which death is assumed to be the material one, and a decision on that question would be irrelevant to the purposes of this case, though possibly an answer to it might throw some light on the other questions in dispute. I do not propose, therefore, to decide or to express any opinion whether the death of Sir Henry or that of Sir Cuthbert fixes the date from which the account should be rendered and is the death in respect of which the duty should be levied and paid. The question whether the duty claimed by the Crown is payable turns upon the true construction of s. 15, sub-s. 4, of the Finance Act, 1894. By s. 1 of the Act it is enacted that "there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty, called estate duty . . . ."; and it is contended upon behalf of the Crown that the charging section, having an effect upon the predecessor's real property, has therefore had an effect on the advowsons, and that they are accordingly charged unless the defendants can shew that they are entitled to some exemption. Sect. 15 of the Act of 1894 is clearly an exempting section. It contains four sub-sections, of which the first, the third, and the fourth commence by enacting that estate duty shall not be payable in respect of certain property, and sub-s. 2 gives power to the Treasury to remit duty on certain property, and provides that no property the duty in respect of which is so remitted shall be aggregated with any other property for the purpose of fixing the rate of estate duty. The language and context of s. 15 shew that its object is to define and limit the property which is made the subject of charge by s. 1. The words in sub-s. 4, "Estate duty shall not be payable in respect of any advowson," taken

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by themselves, are plain. If those words express the object and meaning of the whole sub-section, these advowsons are not liable to duty. The sub-section, however, continues "or church patronage which would have been free from succession duty under section twenty-four of the Succession Duty Act, 1853." It is conceded by the Attorney-General that the reference to "church patronage" is unfortunate and difficult to explain, because twenty years before the Finance Act, 1894, was passed church patronage as most generally known had ceased to exist by reason of the provision contained in s. 3 of the Church Patronage (Scotland) Act, 1874. But whether there be any subject-matter remaining notwithstanding the provisions of that Act to which the words "church patronage" in s. 15, sub-s. 4, of the Finance Act, 1894, could apply or not is, I think, of very small moment, because it does not appear to me that I can draw any useful inference from this peculiarity. If the words are read grammatically they indicate that there is a category of advowsons which would be free from succession duty under s. 24 of the Succession Duty Act, 1853, and that that category is less extensive than the category of advowsons generally; that there are some advowsons which are free, but that some other advowsons under that Act are chargeable. But that is not the effect of that section, because under it all advowsons are free sub modo and until the happening of an event, and therefore s. 15, sub-s. 4, of the Act of 1894 cannot be read as conferring an exemption in favour of a limited class of advowsons, leaving other advowsons chargeable, because there is no limited class indicated by s. 24 of the Act of 1853 to which reference is made.

That grammatical interpretation of sub-s. 4 of s. 15 of the Finance Act, 1894, being impracticable, the next suggestion which might be made is that it was intended by the sub-section compendiously to apply estate duty to advowsons in the same manner and subject to exactly the same conditions as succession duty was applied to them by s. 24 of the Succession Duty Act, 1853; but that construction appears to be open to very formidable difficulties. If the application of estate duty is to be, mutatis mutandis, the same as the application of succession duty, it involves an enactment, by means of the reference to s. 24 of the

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Act of 1853 contained in s. 15, sub-s. 4, of the Act of 1894, of two things, namely, a suspension or postponement of estate duty until the happening of a certain event, and the imposition of estate duty after the happening of that event. It does not appear to me that the imposition of it after the happening of the event can be at all satisfactorily obtained from the mere application of s. 1 of the Act of 1894, because the mode in which advowsons are dealt with under s. 24 of the Act of 1853 is peculiar. That section says that if the successor disposes of the advowson, or any interest in it, for money or money's worth, he shall in that case be chargeable with duty upon the amount or value of the money or money's worth for which the same or any such presentation or interest shall be so disposed of at the time of such disposal. That language appears to mean that although the advowson remains free as long as it continues to be the successor's advowson, as soon as he parts with it, and thereby makes money out of it, he becomes liable to pay out of the proceeds which he obtains by the sale of the advowson. That is a different mode of imposing taxation from that which is primarily adopted by s. 1 of the Act of 1894, and it is a mode of imposing a tax very difficult to import from the Act of 1853 into the Act of 1894 by mere words of somewhat obscure reference. The subject cannot be taxed by words so uncertain as those which have to be relied upon if the construction contended for on behalf of the Crown is to prevail, namely, that the reference to the Act of 1853 imports, with suitable modifications, into the Act of 1894 a personal liability to pay duty out of the proceeds of the advowson. Mr. Austen-Cartmell, however, suggests that it may not be necessary to incorporate the last part of s. 24 of the Succession Duty Act, 1853, and that to endeavour to do so would not be to place the true construction upon s. 15, sub-s. 4, of the Finance Act, 1894. He suggests that the reference to s. 24 of the Act of 1853 is a reference to that part of it which ends with the words "money or money's worth," and that the application in a modified form of estate duty to advowsons is effected, after the period of freedom given by s. 24 of the Act of 1853 has expired, by the application of other sections in the Act of 1894 itself. That seems to me to be incorrect as a matter of

construction. Sect. 15, sub-s. 4, of the Finance Act, 1894, does not say that estate duty shall not be payable in respect of any advowson so long as succession duty would not have been payable in respect of that advowson under s. 24 of the Succession Duty Act, 1853,—which would be a bare postponement clause—but it says that estate duty shall not be payable in respect of an advowson which would have been free from succession duty, which seems to me to mean that where the advowson would have been free from succession duty under s. 24 of the Act of 1853 it shall be free from estate duty under the Act of 1894; that is to say, it is free until it or some interest in it is sold. If that is all, there are no words of charge sufficient to impose upon the successor an obligation to pay measured by or levied upon the proceeds of his sale; and that view is, I think, carried considerably further by the remaining part of the scheme of the Finance Act, 1894. No provision has been made in that Act for fixing the rate of estate duty payable on the proceeds of sale. If s. 15, sub-s. 4, of the Act of 1894 means that an advowson is chargeable after it is sold, or that the proceeds become subject to a charge because they are the proceeds of the sale of an advowson, no express provision is made to fix the rate which is applicable where the realization, possibly long postponed, takes place. No express provision is made as to the person who is to be primarily accountable and liable to pay. There is no machinery expressly provided for this case, and it is manifest that cases not extreme might be suggested in which the levying of duty in the manner suggested would either be wholly impracticable or extremely speculative and unjust by reason simply of the probable lapse of time between the death of the predecessor and the realization of the advowson by the successor. Considerations of that kind emphasize the fact that there is no express provision, such as is made in other cases of postponement, for the rules which are to govern the question of aggregation or no aggregation, or to govern the question of the rate of charge upon a subject-matter, which might be transferred from one scale to another by the mere addition of the proceeds of the sale, and that no express provision is made designating the person who is to be accountable in the

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particular event in question. On behalf of the Crown it was contended that no such provisions were necessary, because it is possible to apply other provisions of the Finance Act, 1894,—not, perhaps, without a little straining—to this case. I do not regard the argument from inconvenience as anything more than a support to the argument upon construction, but I think it lends very considerable support to the latter argument. It is said that s. 22, sub-s. 1 (*f*), of the Finance Act, 1894, by making the expression "property" include the proceeds of sale of property, is sufficient to bring within the ambit of s. 1 of that Act—as property subject to charge—the proceeds of a sale, which ex hypothesi does not happen until the testator is dead, and may quite probably not happen until he has long been forgotten; but s. 22 says that that is to be the meaning of "property" "unless the context otherwise requires," and it appears to me impracticable, by the attraction of that definition clause, to extend s. 1 of the Act so far as to make the proceeds of sale of the advowson in themselves part of the property passing on the death of Sir Henry Peek. If the proceeds are not part of the property passing on the death of Sir Henry Peek, then some separate and express mode of charging them as a substitute for the advowson, which did pass on his death, is required. It has also been contended on the Crown's behalf that under s. 4 the machinery is provided which solves the question of aggregation, not that the proceeds of the advowsons would be an estate in themselves, but that the words "all property so passing in respect of which estate duty is leviable shall be aggregated so as to form one estate" in s. 4 would cover this case. Now I do not dissent from the view that the words "in respect of which estate duty are leviable" are not confined to the present tense; that is to say, they are wide enough to cover an obligation to pay at different dates, possibly widely apart. They only describe the nature of the estate duty which is being dealt with, but the same difficulty occurs with regard to the word "property" in s. 4 as in s. 1. I do not think that the words "property passing on the death of the deceased" in s. 4 can, having regard to the context, namely, the application of s. 15, sub-s. 4, and its consequence, be extended to the proceeds of

sale with which Sir Henry Peek never had anything to do. Reliance has also been placed on s. 6, sub-ss. 2 and 4, together with the possibility of getting relief under s. 11, but these enactments contain machinery not at all appropriate for the collection of estate duty which ex hypothesi would be chargeable upon or in respect of the advowsons after they had been sold. Having regard to the marked difference that there is between estate duty and succession duty, as pointed out in *Winans* v. *Attorney-General* (1), it is not reasonable to read s. 15, sub-s. 4, as a section the object of which is to incorporate and introduce a charge, or even to express an exemption in such a manner as to leave the initial charge in s. 1 applicable as soon as that exemption has terminated. The natural and proper way to read s. 15, sub-s. 4, occurring as it does in a taxing Act, is to follow the words as closely as possible, and to construe it as meaning that "estate duty shall not be payable in respect of any advowson." Good reason can be shewn for the Legislature so enacting if it be necessary to fortify the expressed will of the Legislature by seeking the reasons for it. Both the nature of an advowson and the practice in dealing with it point to the view that it is very distinct from the other class of property which passes on the death; it is very difficult to tax, and so long as it is unsold and the next presentation is made otherwise than for money or money's worth there is nothing which in its nature makes it the natural subject of taxation. The difficulty, if it be a difficulty, arises in giving some satisfactory meaning to the remaining words of sub-s. 4 of s. 15. I am not desirous of accepting the suggestion that it is simply an instance of bad drafting. The fact that it might have been more skilfully drafted does not warrant me in saying that those words must be disregarded. Quite sufficient effect can be given to them by saying that they state the reason why an advowson should be exempted from estate duty by the compendious reference to succession duty in s. 24 of the Succession Duty Act, 1853, and as succession duty is not chargeable on an advowson, but the advowson is free, so estate duty shall not be payable in respect of any

(1) [1910] A. C. 27.

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advowson which would have been free under that sub-section, that is to say, all advowsons.

The principle has often been laid down that taxing Acts are to be construed strictly. Where the Legislature has given the Crown revenue, that revenue must be exacted, however burdensome, but where the Legislature has not clearly given the Crown the revenue, the Act cannot be strained or supplemented by any implications in order to effect that object. I think it would be contravening that principle if I were to hold that sub-s. 4 of s. 15 of the Finance Act, 1894, which in its nature and terms introduces an exemption, contains an indirect and most inconvenient method of subjecting to the tax, long years after the property has passed by death, an advowson, which is in its nature so very difficult to value, and often so incapable of being valued at the time of the death.

Judgment for defendants.

Solicitor for informant: *Solicitor of Inland Revenue.*
Solicitors for defendants: *Johnson, Raymond-Barker & Co.*

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March 28.

London—Buildings—Structure not in conformity with London Building Acts, 1894 to 1909—Notice of Irregularity—Non-compliance with Notice—Summons for Non-compliance—Structure vested in and in Occupation of Crown—Exemption—Subsequent Order by Magistrate to comply with Notice—Power to make Order—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 202.

By s. 202 of the London Building Act, 1894, it is provided that "There shall be exempted from so much of the provisions of this Act as relates to buildings and structures—

"Every building structure or work vested in and in the occupation of Her Majesty . . . ."

On April 5, 1911, a summons was taken out under s. 153 of the London Building Act, 1894, by the respondent, a district surveyor for the purposes of the London Building Acts, 1894 to 1909, against a firm of builders for non-compliance with a notice of irregularity which had been served upon them by the respondent on March 31, 1911, under s. 151 of the London Building Act, 1894, in respect of a building in course of erection by them. The building was admittedly not in accordance with the London Building Acts, 1894 to 1909. On July 20, 1911, a metropolitan magistrate made an order for compliance with the notice, the building having at that date become vested in and in the occupation of the Crown:—

Held, that the magistrate had no power to make the order. The order related to the building itself and was not merely an order that the builder should pay a fine for some previous offence, and inasmuch as the building was at the date of the order vested in and in the occupation of the Crown it was within the exemption contained in s. 202 of the Act.

Case stated by a metropolitan magistrate.

On April 5, 1911, an information was preferred under s. 153 of the London Building Act, 1894, by the respondent, a district surveyor for the purposes of the London Building Acts, 1894 to 1909, against the appellants Dellar Brothers, Limited, who were builders, requiring them to comply with a notice of irregularity previously served upon them under the Act of 1894.

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At the hearing before the magistrate the following facts were admitted or proved :—

Bipsine (1910), Limited, manufacturing bakers, were the lessees for a term of which about eighty years remained unexpired of a piece of ground or yard at the back of their manufacturing premises and fronting on Greycoat Street within the city of Westminster, and in or about February, 1911, negotiations were commenced between Bipsine (1910), Limited, and the Territorial Force Association of the County of London (a body corporate incorporated under the Territorial and Reserve Forces Act, 1907, (7 Edw. 7, c. 9), and hereinafter called "the association"), for a lease or tenancy to the association of a shed to be erected on the piece of ground or yard to be used for the storage of the association's waggons.

On February 22, 1911, Bipsine (1910), Limited, wrote to the association a letter offering (subject to the consent of the ground landlords and to an agreement to be approved by the company's solicitors) to let to the association the piece of ground or yard and a shed to be erected thereon upon certain terms mentioned in the letter, and on March 9, 1911, Captain Lee Wright, on behalf of the association, wrote a letter in reply informing Bipsine (1910), Limited, that the association would take the piece of ground or yard on the terms mentioned in the letter of February 22, 1911.

On or about March 27, 1911, the appellants Dellar Brothers, Limited, as builders for Bipsine (1910), Limited, commenced to erect on the piece of ground or yard the shed or building the subject of the present proceedings. The plans were prepared by an architect employed by Bipsine (1910), Limited, and were shewn by him to and approved by an officer of the Territorial Forces on behalf of the association. These plans admittedly shewed a building not in accordance with the London Building Acts, 1894 to 1909.

On March 28, 1911, a building notice under s. 145 of the London Building Act, 1894, was duly served on the respondent by the appellants Dellar Brothers, Limited, and on March 31, 1911, a notice of irregularity under s. 151 of the Act was duly served upon the appellants Dellar Brothers, Limited, by the respondent.

The notice of irregularity (so far as material) was as follows :—

"The London Building Acts, 1894 to 1909.

"To Messrs. Dellar Brothers, Limited, of Kingston Road, Staines, Builders.

"I hereby give you notice that the work that you are now engaged in doing at the undermentioned building or structure is not in conformity with the said Acts in the particulars hereunder stated : and I hereby require you, within forty-eight hours from the date hereof, to bring the same in conformity with the said Acts in such particulars.

. . . . . .

"Particulars of work done in contravention of the Acts, and to be amended :—

"The building is enclosed with wood framing and corrugated iron instead of with walls constructed of brick stone or other hard and incombustible substances . . . .

"To enclose the said building with walls constructed of brick stone or other hard and incombustible substances, with proper footings and concrete foundations as required by the by-laws.

. . . . . .

"Dated this thirty-first day of March 1911 . . . ."

The notice of irregularity was not complied with, and on April 5, 1911, a summons was issued against the appellants Dellar Brothers, Limited, requiring them to comply with the notice. The summons was served on the appellants Dellar Brothers, Limited, on April 10, 1911.

On April 8, 1911, property of the association was brought to the premises and left there. On April 21, 1911, the shed was completed and possession of it was taken by the association, who at once entered into occupation thereof and stored their property in it. The shed was such a building as having regard to s. 82 of the Act of 1894 could not lawfully be erected without the approval of the London County Council, and no such approval had in fact been obtained.

The summons was heard on May 4 and 18, 1911. Some time between March 9, 1911, and May 16, 1911, the consent of the ground landlords was obtained to the proposed letting, and on May 16, 1911, an agreement for that purpose was duly

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entered into between Bipsine (1910), Limited, of the one part and the association of the other part.

On July 20, 1911, the magistrate made an order on the appellants Dellar Brothers, Limited, under s. 153 of the London Building Act, 1894, requiring them to comply with the notice of irregularity.

By s. 202 of the London Building Act, 1894, it is provided that "There shall be exempted from so much of the provisions of this Act as relates to buildings and structures—

"Every building structure or work vested in and in the occupation of Her Majesty her heirs and successors either beneficially or as part of the hereditary revenues of the Crown or in trust for the public service or for public services; also

"Any building structure or work vested in and in the occupation of any department of Her Majesty's Government or of the Metropolitan Police or of the Trustees of the British Museum for public purposes or for the public service; also

"Any building structure or work vested in and occupied for the service of the Duke of Cornwall for the time being."

The magistrate held that the association was not a department of the Government and that in the circumstances above stated the premises were vested in the association on April 1, 1911, but that possession was not taken by them till April 21, 1911. In the circumstances he held that he had power to make an order requiring the appellants Dellar Brothers, Limited, to comply with the notice of irregularity which he accordingly made.

The question for the opinion of the Court was whether on the facts above stated the decision of the magistrate was correct in law. (1)

S. A. T. Rowlatt and *St. John G. Micklethwait*, for the appellants. The magistrate made the order on July 20, 1911, and

(1) The Territorial Force Association of the County of London was not a party to the proceedings before the magistrate, but became a party to the appeal before the Divisional Court as a person aggrieved pursuant to s. 33 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), by joining with Dellar Brothers, Limited, in the application to the magistrate to state a case and in giving notice of appeal to the respondent.

at that date he had no power to make it, for the building was then vested in and in the occupation of the Crown by its servants the Territorial Force Association within the meaning of s. 202 of the London Building Act, 1894: *Wixon* v. *Thomas.* (1) The order specifically affects the Crown as owner of the building and if complied with would affect the building itself. Assuming that the builder had acted in contravention of the London Building Act, 1894, at some time previous to the order, that fact gave the magistrate no power to make an order against the builder affecting the building which was then in occupation of the servants of the Crown. Even if the Crown was not in occupation when the summons was issued, it could not be affected by an order made when it clearly was in occupation and the builder had gone. The act of issuing a summons gives no sort of vested right to an order upon it, and on July 20, 1911, when the order was made, s. 153 of the London Building Act, 1894, which alone could give power to make it, had ceased to apply. Where facts happen during magisterial proceedings commenced by summons which give rise to a defence, the case is analogous to a defence in a civil proceeding arising after writ. In the present case facts have happened before the magistrate gave his judgment which made the building no longer such a building as is subject to the law.

[Some argument also took place as to the nature of the occupation of the structure at the date of the summons, but the Court took the view that it was unnecessary to deal with this point and expressed no opinion upon it.]

Ryde, K.C. (*Daldy* with him), for the respondent. It is not disputed that the Territorial Association acts for the Crown and is either a department of the Government or a servant of the Crown. But in order that a building may be in occupation of the Crown within the meaning of s. 202 of the London Building Act, 1894, it must be so in occupation at the date of the summons. The date of the adjudication on a summons cannot affect the question as to whether an offence has been committed or not. If there has been a contravention of the London Building Act, 1894, the servants of the Crown cannot by intervening put an end to the offence: *Tubb* v. *Good.* (2) The question whether a

(1) [1911] 1 K. B. 43. (2) (1870) L. R. 5 Q. B. 443.

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building is exempt from the provisions of the London Building Act, 1894, arises immediately after acts which are sufficient to constitute an offence are done, and if the servants of the Crown take the building with notice that an offence has been committed (it must be assumed that they had notice, as every one is presumed to know the law) they take it subject to the liability to have the provisions of the Act enforced against it. The vesting of the building in the Crown not having taken place till May 16, 1911, the date of the agreement, the summons taken out for an offence already committed must be dealt with as if the rights of the parties were crystallized on the date of the summons.

DARLING J. In this case it is sought to enforce an order in regard to a building now occupied by the Crown for purposes connected with the defence of the country. The building which was put up by the appellants Dellar Brothers, Limited, a firm of builders, upon certain land, and the land on which it stands, is found by the magistrate to have become vested in the Territorial Force Association on April 1, 1911, and he found that the possession of it was taken on April 21, 1911. A summons had been taken out against the appellants Dellar Brothers, Limited, for contravention of a notice of irregularity served upon them under the London Building Act, 1894. That summons was taken out on April 5, 1911, by the respondent, and the magistrate heard it on July 20, 1911, and made an order requiring the appellants Dellar Brothers, Limited, to comply with the notice of irregularity. Compliance with the notice would have involved the carrying out of requisitions made by the district surveyor to make this building conformable with the provisions of the London Building Act, 1894. The order has not been complied with, and if it is good in law the consequences which ensue from non-compliance with it appear from s. 153, sub-s. 2, of the London Building Act, 1894, which is as follows: "If the order be not complied with the council may if they think fit after giving seven days' notice to such person enter with a sufficient number of workmen upon the premises and do all such things as may be necessary for enforcing the requisitions of the notice and for bringing any building or work into conformity with the

provisions of this Act and all expenses incurred by the council in so doing may be recovered in a summary way either from the person on whom the order was made or from the owner of the premises." In my judgment, on July 20, 1911, when the order was made, there was no power to make it. The building at that time was the property of the Crown; the order was not an order on the builders that they should pay some fine for having done something wrong some time before; it was an order relating to the building and not to a person, and the effect of it was that the building must be demolished and put up again in a different shape. That order could not be enforced with regard to a building in the occupation of the Crown for the purpose of public defence, and, therefore, I do not think the date upon which the summons was taken out is material. The date when the order was made must be looked at, and on that date there was no power to make it in respect of the building to which it related.

PICKFORD J. I am of the same opinion.

BANKES J. I agree.

Appeal allowed.

Solicitors for appellants: *Fladgate & Co.*
Solicitors for respondent: *Hicklin, Washington & Pasmore.*

J. E. A.

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Feb. 23.

[IN THE COURT OF APPEAL.]

METROPOLITAN ELECTRIC TRAMWAYS, LIMITED *v.* TOTTENHAM URBAN DISTRICT COUNCIL.

Rates—General District Rate—Assessment—Tramway—"Land used only as a railway"—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 211, *sub-s.* 1 (*b*).

A company were the owners and occupiers of, and worked as one connected system, a tramway and a light railway, which were constructed in and along certain public streets and roads in the district of an urban council. The tramway and the light railway were constructed and worked under and subject to the provisions of certain local Acts and Orders; they had a junction with each other and were worked by electricity on the overhead system. They were identical as to mode of construction and materials used, and the rails of each were laid with their uppermost surface level with the surface of the highway; the same carriages were used upon them and ran through from the one on to the other, and the electrical energy used for working both the tramway and the light railway was generated at the same power station and thence transmitted over a common system of cables and mains to sub-stations:—

Held that the tramway was "land used only as a railway constructed under the powers of an Act of Parliament" within the meaning of s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875, and that the company were therefore entitled in respect of their tramway to be assessed to the general district rate at one fourth only of its net annual value.

Swansea Improvements and Tramway Co. v. *Swansea Urban Sanitary Authority* [1892] 1 Q. B. 357, overruled.

Appeal of the Metropolitan Electric Tramways, Limited, from the decision of a Divisional Court upon a case stated by justices.

At the petty sessions holden at Tottenham a complaint had been preferred by the urban district council of the district of Tottenham against the appellants charging that the appellants, being a corporation duly rated and assessed to the general district rate in and by a rate made in April, 1910, in the sum of 495*l.* 12*s.* 6*d.*, had not paid the same in full or otherwise than by payment of the sum of 123*l.* 18*s.* 2*d.* part thereof, and had refused and neglected to pay the sum of 371*l.* 14*s.* 4*d.* residue thereof. Upon the hearing, the appellants were ordered to pay to the respondents the said sum of 371*l.* 14*s.* 4*d.*; but the following case was stated for the opinion of the High Court.

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Upon the hearing of the complaint the following facts were admitted or proved :—

1. On April 1, 1910, the respondents made a general district rate under the Public Health Act, 1875, upon all property in the district for the purpose of defraying the expenses incurred by them in the execution of or by virtue of the Public Health Acts, and the appellants were thereby rated in respect of the tramway hereditaments hereinafter mentioned at the rateable value of 4575*l.*, and the sum of 495*l.* 12*s.* 6*d.* was demanded as the amount of rate payable in respect of the said rateable value.

2. Subject to the question raised by this case, the said rate was duly made and demanded, and the appellants were therein rated in respect of their occupation of the lines of rails of the tramways within the district hereinafter mentioned.

3. The appellants paid to the respondents in respect of the said rate the sum of 123*l.* 18*s.* 2*d.*, being the total sum charged by the said rate calculated on one fourth part only of the said rateable value.

4. The appellants are the occupiers of and work as one connected system certain tramways and light railways constructed in and along certain public streets and roads, all of which are highways, in the counties of Middlesex, London, and Hertford. [Here followed a reference to the delineation of the tramways and light railways upon a plan which formed part of the case.] The appellants purchased the said tramways from the North Metropolitan Tramways Company and are the lessees of the said light railway under leases granted by the Middlesex County Council.

5. The said tramways and light railways were constructed and are worked under the powers and subject to the provisions of the following Acts and Orders, or some of them :—

As to the said tramways: The North London Suburban Tramways Order, 1879; the North London Tramways Act, 1882; the North Metropolitan Tramways Acts, 1892, 1897, and 1902; the Tottenham Improvement Act, 1904; the Metropolitan Electric Tramways Act, 1908.

As to the said light railways: The County of Middlesex Light

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Railways Orders, 1901 and 1903 (both made and confirmed under the Light Railways Act, 1896).

6. Certain portions of the said tramways and light railways constructed and worked under the Acts and Orders hereinbefore mentioned or some of them (hereinafter called respectively "the tramway" and "the light railway") are situate within the district. . . . . The complaint was made in respect of the tramway and not of the light railway.

7. The tramway and the light railway, in accordance with the provisions of the County of Middlesex Light Railway Order, 1901, have a junction with each other and also have junctions with other of the tramways and railways outside the district, and all of them are worked by the appellants as one connected system as aforesaid.

8. The tramway and the light railway as to mode of construction and the materials used therein are identical, and consist of lines of iron or steel grooved or slotted rails laid with the uppermost surface thereof level with the surface of the highway, and overhead wires suspended from posts placed alongside of or in the middle of the streets convey the electric power required for moving the carriages thereon. The carriages used upon the tramway and the light railway are the same carriages, and have flanged wheels running on the rails, and the same carriages used on the tramway run through and over the light railway for the conveyance of passengers and parcels thereon as part of one common system. The charges authorized by the Acts and Orders aforesaid, or some of them, are also applicable to both the tramway and light railway. The same carriages are moved along the rails both of the tramway and the light railway by electrical power on what is commonly called the overhead system as above mentioned. [Here came a statement as to photographs which accompanied and were made part of the case.]

9. The electrical energy used for working the tramway and the light railway as aforesaid is generated at the same power station and is thence transmitted over a common system of cables and mains to sub-stations. The tramway and the light railway both take the power required by them in common either from the said main station or sub-stations.

10. Pursuant to the powers of the said Metropolitan Electric Tramways Act, 1908, the appellants have appointed stages upon the tramway and the light railway or portions thereof as part of the whole system aforesaid and as one undertaking, and carry both passengers and parcels over fixed through routes, some of which are partly upon the tramway and partly upon the light railway, at through fares and charges.

11. The lines of rails and the land occupied thereby forming the tramway, together with the overhead wires and the posts from which they are suspended, are the premises assessed in the said rate and are used only in the same manner as the light railway is used for public conveyance.

12. Prior to the year 1904 the appellants in respect of the tramway were assessed by the respondents to the general rate of the district as a railway is assessed under s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875, namely, in the proportion of one fourth part only of the net annual value thereof.

13. The appellants, in respect of the lines of rails and the land occupied thereby forming the light railway, are assessed by the respondents to the general district rate of the district in the proportion of one fourth part only of the net annual value thereof, and no question was raised by either of the parties in relation thereto.

14. It was contended on behalf of the appellants that the premises forming the tramway so assessed were assessable in the said rate under the Public Health Act, 1875, s. 211, sub-s. 1 (*b*), at not more than one fourth part only of the net annual value, and that the appellants were in respect of the said premises entitled to the benefit of the said provision.

For the respondents it was contended that the said premises were not so assessable, and that the appellants were not entitled to the said benefit, and they relied on the case of *Swansea Improvements and Tramway Co.* v. *Swansea Urban Sanitary Authority* (1) as supporting that view.

15. We are of opinion that the case is governed by the decision in the said *Swansea Case* (1), and that the tramway is not a railway within the meaning of s. 211, sub-s. 1 (*b*), of the Public

(1) [1892] 1 Q. B. 357.

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Health Act, 1875, and we accordingly made an order for the payment by the appellants to the respondents of the said sum of 371*l.* 14*s.* 4*d.* and the costs of the said complaint together with ten guineas costs of the respondents.

The question of law arising on the above statement for the opinion of the Court is: Whether upon the facts stated the appellants are entitled under the provisions of s. 211 of the Public Health Act, 1875, to be assessed in respect of the said tramway in the proportion of one fourth part only of the net annual value thereof.

If the Court shall be of opinion that the said order was legally and properly made, the said order is to stand; but if the Court shall be of opinion to the contrary, then the said order is to be reversed.

The Divisional Court (Lord Alverstone C.J., Darling and Bankes JJ.) held that they were bound by the *Swansea Case* (1), and gave judgment for the respondents.

The tramway company appealed.

Danckwerts, K.C., and *C. C. Hutchinson, K.C.*, for the appellants. The substantial question is whether this particular tramway is a railway, or, more precisely, is "land used only as a railway constructed under the powers of an Act of Parliament"; if so, the appellants are entitled under s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875, to be assessed in the proportion of one fourth part only of its net annual value. The Divisional Court gave no decision of its own on the point, considering itself bound by the decision in *Swansea Improvements and Tramway Co.* v. *Swansea Urban Sanitary Authority* (1) to hold that the tramway was not "used only as a railway" within the meaning of that section; but that decision is quite inconsistent with two recent cases which went to the House of Lords, *Blackpool and Fleetwood Tramroad Co.* v. *Thornton Urban Council* (2) and *Wakefield and District Light Railways Co.* v. *Wakefield Corporation.* (3) The argument for the appellants is practically summed up in some

(1) [1892] 1 Q. B. 357.
(2) [1907] 1 K. B. 568; [1909] A. C. 264.
(3) [1907] 2 K. B. 256; [1908] A. C. 293.

observations of Lord Shand which are quoted by Lord Dundas in the recent case of *Glasgow Corporation* v. *Assessor of Railways and Canals* (1), and are as follows: "A tramway is a species of railway, and railway and tramway undertakings respectively take their names as such from the fact that they possess and use for purposes of conveyance rails fixed in the ground but differing somewhat in form of construction." In other words, a tramway is a kind of railway, and is "land used only as a railway." The view expressed by Lord Shand has been in substance adopted by the House of Lords in the cases cited. The reason for the exemption is clearly explained by Erle J. in *South Wales Ry. Co.* v. *Swansea Local Board* (2) in these terms: "The general scheme of the enactment is, that the occupiers of the classes of property most benefited by the expenditure of the district rates shall be liable to be rated at a higher rate, the occupiers of the classes less benefited at the lower rate; and the class of property most benefited is that which is occupied immediately for the purpose of residence; and the kinds of property not so occupied are not to be rated so highly. Such is the general object of the Act: and we are now to apply its language to the particular case." In the present case we have a system consisting of a light railway and a tramway and running along the public road; a light railway in a public road or street is always, as in the present case, constructed like a tramway; and in the *Wakefield Case* (3) Lord Loreburn C. obviously regarded the structure as the important point to consider. In the *Swansea Case* (4) the Court took the view that tramways were something essentially different from railways, but that view cannot now be supported. In the *Blackpool Case* (5) the facts were no doubt slightly different from the present case, as the tramroad was on raised rails laid on sleepers and was constructed on land which was the exclusive property of the company and was fenced off from adjoining land except at level crossings; but it was worked with certain tramways as one undertaking, and Gorell Barnes P. said that physically it was a railway, for it was a road containing rails on which vehicles

(1) (1910) 48 Sc. L. R. 4.
(2) (1854) 4 E. & B. 189, at p. 197.
(3) [1908] A. C. 293.
(4) [1892] 1 Q. B. 357.
(5) [1907] 1 K. B. 568; [1909] A. C. 264.

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travelled in the ordinary way in which railway traffic is conducted. That case is really decisive of the present one, for no distinction can be satisfactorily founded upon the fact that there the tramway ran upon private ground while here it runs along the public road. That point was considered in the *Wakefield Case* (1), where the tramway ran along the public streets, and it was contended that therefore it could not come within the description of "land used only as a railway"; but Lord Loreburn C., in expressing the opinion of the House of Lords, held that the user there referred to was the user by the occupier who was to be rated in respect of it. The decision in the *Swansea Case* (2) is wrong and should be overruled. [They also cited *Bishop* v. *North* (3); *Attorney-General* v. *Edison Telephone Co.* (4)]

Macmorran, K.C., and *Ryde, K.C.*, for the respondents. A tramway, properly so called, as distinguished from a light railway, is not a railway for the purposes of s. 211, sub-s. 1 (*b*), of the Act of 1875. The North Metropolitan Tramways Acts, 1892 and 1897, under which the tramways were originally constructed, incorporate the general Tramways Act, but make no mention of railways or of the Railways Clauses Consolidation Act, 1845. The legislative powers under which the particular "way" is constructed afford the best guide to the determination of the question whether it is merely a "tramway" or comes within the term "railway." The *Blackpool Case* (5) is not in point, for there the tramway was on the private land of the company, but no doubt in the *Wakefield Case* (1) the tramway, as in the present case, ran along the public street. The simple answer is that these particular tramways were constructed as tramways and as nothing else, and that they are not governed by any railway legislation. The decision in the *Wakefield Case* (1) is really in favour of the respondents. It decided that a light railway was, by virtue of the Light Railways Act, 1896, a railway which was entitled to the exemption conferred by s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875. The principle of that decision was

(1) [1907] 2 K. B. 256; [1908] A. C. 293.
(2) [1892] 1 Q. B. 357.
(3) (1843) 11 M. & W. 418.
(4) (1880) 6 Q. B. D. 244.
(5) [1907] 1 K. B. 568; [1909] A. C. 264.

that the light railway was distinguishable from a tramway by its legislative origin, though not by its physical appearance. There is nothing to shew that in either case the House of Lords thought that the *Swansea Case* (1) was wrongly decided, and it has clearly not been overruled; it ought therefore still to be considered as good law, and it is conclusive of the present case. [They also cited *Williams* v. *London and North Western Railway.* (2)]

Danckwerts, K.C., was not called upon to reply.

FARWELL L.J. This is an appeal from the judgment of a Divisional Court who, without expressing an opinion of their own, considered that they were bound by the decision of a Divisional Court in *Swansea Improvements and Tramway Co.* v. *Swansea Urban Sanitary Authority* (1), and therefore followed it. We are asked to overrule that decision.

The question for our decision arises on a special case stated by justices; it depends on the construction of s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875, which section, so far as is material for the present purpose, runs thus: "The occupier of any land covered with water, or used only as a canal or towing path for the same, or as a railway constructed under the powers of any Act of Parliament for public conveyance, shall be assessed in respect of the same in the proportion of one fourth part only of such net annual value thereof." The words on which the present case turns are "land . . . . used only . . . . as a railway constructed under the powers of any Act of Parliament." That section has in recent years received a good deal of judicial consideration, and the meaning of the exemption from rating as to three fourths of the net annual value was explained by Lord Campbell C.J. in *South Wales Ry. Co.* v. *Swansea Local Board* (3) Erle J. also says in the same case (4): "The general scheme of the enactment is that the occupiers of the classes of property most benefited by the expenditure of the district rates shall be liable to be rated at a higher rate, the occupiers of the classes less benefited at the lower rate; and the class of property most benefited is that which is occupied immediately for the

(1) [1892] 1 Q. B. 357.
(2) [1900] 2 Q. B. 760.
(3) 4 E. & B. 189.
(4) Ibid. at p. 197.

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purpose of residence; and the kinds of property not so occupied are not to be rated so highly. Such is the general object of the Act, and we are now to apply its language to the particular case." The case that we have to-day to deal with, bearing in mind the language of the Act and the explanation of it to which I have just referred, is best stated by reading paragraph 8 of the special case. The question arises with respect to a tramway, and the photographs with which we have been supplied shew that all the tramways and light railways mentioned in the case are identical in position, and that the same rails and the same carriages are used for both. Paragraph 8 runs thus: "The tramway and the light railway as to mode of construction and the materials used therein are identical, and consist of lines of iron or steel grooved or slotted rails laid with the uppermost surface thereof level with the surface of the highway, and overhead wires suspended from posts placed alongside of or in the middle of the streets convey the electric power required for moving the carriages thereon. The carriages upon the tramway and the light railway are the same carriages, and have flanged wheels running on the rails, and the same carriages used on the tramway run through and over the light railway for the conveyance of passengers and parcels thereon as part of one common system. The charges authorized by the Acts and Orders aforesaid, or some of them, are also applicable to both the tramway and light railway. The same carriages are moved along the rails both of the tramway and the light railway by electrical power on what is commonly called the overhead system as above mentioned." Then photographs are appended. So far, therefore, as physical construction and physical appearance go, the light railways and tramways are identical.

What is the meaning in s. 211, sub-s. 1 (*b*), of the Act of 1875 of the expression "land used . . . . as a railway constructed under the powers of any Act of Parliament"? There have been many cases as to the meaning of the word "tramway." It cannot, perhaps, be better put than by Lord Shand in the passage quoted by Lord Dundas in *Glasgow Corporation* v. *Assessor of Railways and Canals*. (1) The particular section upon which Lord Shand

(1) 48 Sc. L. R. at p. 5.

was expressing his opinion was s. 3 of the Valuation of Lands (Scotland) Amendment Act, 1867 (30 & 31 Vict. c. 10), which is in these words: "In ascertaining the yearly rent or value . . . . of the lands and heritages in any parish, county, or burgh belonging to or leased by any railway company and forming part of the undertaking of such company, one half of the expenses incurred in maintaining or repairing the permanent way of railways, and charged to revenue in the published accounts of such railway company for the year preceding that for which the valuation is made, shall be allowed by the assessor of railways and canals as a deduction before the cumulo yearly rent or value of each railway is fixed, provided that such assessor is satisfied that such expenses have been truly expended in maintaining or repairing the permanent way of each such railway." It was contended there that a tramway was not a railway within the meaning of that section. The subject-matter is germane to the present case, for it was the valuation of property for rating purposes in Scotland. Lord Shand said in that case: "A tramway is a species of railway and railway and tramway undertakings respectively take their names as such from the fact that they possess and use for purposes of conveyance rails fixed in the ground but differing somewhat in form of construction. In the sense of the Valuation Acts the Lord Ordinary is of opinion that a tramway company is included under the term railway company, which term is not limited to such railway companies as use locomotive power." And in *Williams* v. *London and North Western Railway* (1) there is a definition or statement by A. L. Smith L.J. which seems to supply a very good synonym for use when talking of railways or tramways within the meaning of this particular Act; he says: "When the Legislature deals with land 'used as a railway,' is it conceivable that it was intended to include a warehouse or shed not connected with a railway? Speaking for myself, I cannot put that construction on the Act. What was meant was a railway in the ordinary sense, that is, a line of rails connecting one place with another, over which goods and passengers are carried, and not such rails as those within these four walls." Bearing in mind that the reason for the exemption is that these ways which are

(1) [1900] 1 Q. B. 760, at p. 767.

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made upon rails for the public convenience (and also, no doubt, for the profit of the makers) do not get the same full benefit from the expenditure of the rates that buildings and other property of that nature obtain, the exemption is given to land used as a place on which rails are laid for the purpose of conveyance. As far as the substance of the thing is concerned, when once it is brought within the definition of A. L. Smith L.J., as rails used for the conveyance of goods and passengers, it makes very little difference whether one calls it a railway, or a tramway, or a light railway, or a tramroad. It is a question of substance, not of name. In the present case, so far as the physical nature and appearance of the thing are concerned, the light railway and the tramway are absolutely identical. No doubt so far as it is a light railway it is entitled to exemption; that follows from the decision in *Wakefield and District Light Railway* v. *Wakefield Corporation.* (1) But it is said, and with truth, that that decision depends largely upon a specific provision in the Light Railways Act that a light railway is to be deemed a railway; that fact does not, however, prevent that decision being an authority in the present case. Here there are two points for our consideration; the first is physical, that is, the nature and appearance of the way which is used. There is no doubt that it falls within the description of a way on which rails are laid for traffic; it answers to the physical description of a light railway, and secondly it falls within the description "used as a railway."

But it is said that a tramway stands on a different footing, and it is true that in support of that view we have the direct decision of a Divisional Court in *Swansea, &c., Tramway Co.* v. *Swansea Urban Sanitary Authority.* (2) I think, however, that the reasoning upon which that decision is based is inconsistent with the more recent authorities, and that the decision can no longer stand. That was the case of a tramway communicating by points and switches with a railway which was worked in conjunction with the tramway and which had been constructed under an Act of Parliament. Wills J. (3) says: "The objection which has been taken on the part of the urban sanitary authority, and which,

(1) [1908] A. C. 293. (2) [1892] 1 Q. B. 357.
(3) [1892] 1 Q. B. at p. 360.

in my opinion, is a good one, is that tramways are something essentially different from railways, and that in the legislation of 1875 where railways are spoken of they cannot possibly be supposed to include tramways." With the greatest respect to the learned judge I do not think that he has stated the real point. I think that "land used for tramways" is not used in a manner essentially different from "land used for railways." In a sense, no doubt, there is a good deal of legislation, including the Railways Clauses Consolidation Act, 1845, which is confined to railways in the ordinary sense of the term; but when we are speaking of "land used as a railway" and are considering the use of the land as a guide to the consideration of the exemption by reason of such use, it seems immaterial to consider the form of construction of the rails, &c., if in fact the land, with the rails upon it, is used as a railway would be used. Wills J. then goes on to say: "By that time [1875] tramways were so completely a part of the ordinary communication made use of in this country, that in 1870 a Tramways Act had been passed consolidating the provisions which in all ordinary cases for the future were to apply to tramways." That appears to me to have regard exclusively to the legislative creation of the body that owned and worked the tramway and not to its user of the land and rails after it had been so created. Doubtless there are two governing considerations; first, and to my mind the more important, the actual form of physical user, and secondly the fact that the railway has to be constructed under an Act of Parliament. No question arises in the present case as to construction under an Act of Parliament; both the light railway and the tramway were so constructed, and for some purposes they are treated as one undertaking. There is therefore no question that the railway in the present case is within the language of s. 211, sub-s. 1 (*b*). The actual user of the land is for transit upon the rails laid down on the land, and the land is used for the conveyance of passenger traffic.

A somewhat similar, but not identical, question came before the Court of Appeal and the House of Lords in *Blackpool and Fleetwood Tramroad Co.* v. *Thornton Urban District Council.* (1) I was a member of the Court of Appeal, and all the arguments

(1) [1907] 1 K. B. 568.

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which have been addressed to us in the present case were brought forward then. Gorell Barnes P., who presided on that occasion, in the course of his judgment (1) referred to what was, no doubt, something physically different from the state of things in the present case. Here we have ordinary rails laid down in the high road on a level with the surface of the road; but in that case the tramroad consisted of raised rails lying on sleepers constructed on land which was the exclusive property of the company, and it was fenced off from the adjoining land except at level crossings of roads, the tramroad and tramways being worked as one undertaking by electricity on the overhead system. Gorell Barnes P. said, "Physically it seems to me that it is a railway; it is a road containing rails on which vehicles must travel in the ordinary way in which railway traffic is conducted." That exactly applies to the present case; in this respect there is no distinction between that case and the present case. Then the learned President goes on (2) to deal with the argument as to the construction of the tramroad, and says: "The argument of counsel for the respondents appears to require the insertion after the word 'constructed' of the words 'as a railway.' I have a difficulty in appreciating exactly what is meant by putting in the words constructed 'as a railway.' If they mean constructed as a railway in fact, it seems to me that their own statement in argument shews that this case comes within that definition. If it is meant to say that it must be constructed as a railway to which all the railway legislation applies, I do not find those words there, and it does not seem to me that it is necessary to put such a construction upon the Act." Indeed, the whole argument here depends on giving the go-by to the physical user and on searching for something in the statutory enactment which compels us to say, contrary to the natural fact, that that which is used for the same purpose, and in the same manner, as a railway is not a railway by reason of the use of the word "tramway." In *Blackpool and Fleetwood Tramroad Co.* v. *Thornton Urban District Council* (3) the same consideration appears that the tramway legislation and the railway legislation are two different things,

(1) [1907] 1 K. B. at p. 576.
(2) Ibid. at p. 580.
(3) [1907] 1 K. B. 568; [1909] A. C. 264.

and there was also an argument there which is not open to the respondents in the present case, namely, that in that case some of the provisions of the Railways Clauses Consolidation Act, 1845, were brought into operation, by providing that for the purpose of those clauses a tramway should be deemed to be a railway. It was therefore possible to argue that, when the Legislature intended a tramway to be a railway, it said so, and by saying that it was to be deemed to be a railway in these specific instances it intended that the tramway was not to be a railway for other purposes. That argument was, however, not adopted in this Court or in the House of Lords, and it is not open in the present case, for here there is no incorporation of any clauses of the Act of 1845, and the mere fact that a tramroad has nothing to do with railway legislation proper seems to me to be immaterial. I am unable to find any ground on which we can say that the reasoning of the decisions of the Court of Appeal and House of Lords in that case should not govern the present case. In the House of Lords the judgment of the House was given by Lord Macnaghten, who said (1): "There is nothing in the Public Health Act, 1875, or in the earlier Acts, in which the same provision is found, to confine the word 'railway' as used in those Acts to a particular kind of railway, or to limit the generality of the expression in any way. . . . . I think that the question is, What is the thing according to common understanding? How would it be described in ordinary parlance? It seems to me that if ever there was a case to which the maxim res ipsa loquitur may properly be applied it is the case now before your Lordships. Would anybody, seeing this road or way, or the photographs of it, which are in evidence, call it anything but a railway? I observe that Buckley L.J., who did not altogether agree with his colleagues, says (2): 'It is the fact . . . . that this tramroad as used differs physically, as I understand, in no material particular from a railway such as that to which the Railway Acts apply.'" That being so, it seems to me that when once you have arrived at the fact that the way in question is used exactly as if it were a railway, and that there is nothing in any of the Acts to shew that it is not to be regarded as that which it in

(1) [1909] A. C. at p. 267. (2) [1907] 1 K. B. at p. 587.

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fact is, it necessarily results that our decision must follow the later authorities, and we must therefore overrule the case of *Swansea, &c., Tramway Co.* v. *Swansea Urban District Council.* (1) This appeal must therefore be allowed.

KENNEDY L.J. I have come to the same conclusion, and will state shortly my reasons for agreeing with the judgment which has just been delivered. We are deciding this case upon a special state of facts; we are not deciding that everything that may be called a tramway is a railway for the purposes of s. 211. The description in paragraphs 8 and 9 of the special case makes it clear that for all practical purposes this tramway is a railway and is used as a railway in the technical sense of that word; it is a railway not only as regards its method of construction, but also as regards the purposes to which it is applied and the method or power applied by way of traction to the carriages. I agree that the case of *Swansea, &c., Tramway Co.* v. *Swansea Urban District Council* (1) is a decision in the respondents' favour; but in my judgment it is impossible to reconcile that case with, at any rate, one decision of this Court which was affirmed in the House of Lords. The reasoning of Wills J. dealt with a tramway, and he held that "tramways are something essentially different from railways," and that "in the legislation of 1875"—which is the legislation with which we are concerned in the present case—"railways cannot be supposed to include tramways"; and he goes on to say that, while he would not attempt to define either a railway or a tramway, it was sufficient to say that no ordinary person had any difficulty in distinguishing between the two. On the facts of the present case I should, with great respect, be unable to come to that conclusion; I cannot see wherein this tramway differs from the railway with which it is interlaced in working, and whose carriages can and do run on both the tramway and the railway. Looking at the two systems in the present case, the tramway and the railway, they appear to me to be indistinguishable. But it is said that, apart from the decision in the *Swansea Case* (1), they are, and ought to be, treated differently. Speaking

(1) [1892] 1 Q. B. 357.

for myself, I agree with Mr. Ryde, that the *Wakefield Case* (1) is of very little use to the appellants. There are phrases in the judgment which may be favourable to their contention; but if I asked myself the question whether it overruled the *Swansea Case* (2), I could not say that it did. I think we should certainly not be flying in the face of the decision in the *Wakefield Case* (1) if we decided the present case in favour of the respondents. It was a decision as to the position of a light railway, and in the judgments both of Cozens-Hardy M.R. and Buckley L.J. in the Court of Appeal (3) there are to be found expressions which favour the view presented to us by the respondents. Cozens-Hardy M.R. (4) contrasts a railway and a tramway in a passage which is in favour of Mr. Ryde. He says: "It seems to me almost too plain for argument that it"—the thing there in question—"is a railway and not a tramway. A light railway constructed under the Act of 1896 is repeatedly spoken of as a railway." And again, "And there are to be found in the Act many differences of a substantial kind for the benefit mainly of a light railway company as compared with a tramway company formed and carrying on its operations under the Tramways Act, 1870. I therefore feel no doubt that we must approach this case having regard to the fact that we are dealing here with a railway and not a tramway within the meaning of the Act of Parliament." And Buckley L.J. says in terms (5), "A light railway is in its statutory origin a different thing from a tramway. Then, if this undertaking is negatively not a tramway, is it affirmatively a railway? It seems to me that it is." I do not propose to refer to the decision in that case in the House of Lords, because I do not think anything can there be found which can fairly be said to overrule, or even to throw doubt upon, the decision in the *Swansea Case.* (2) But then we have the decision, both in the Court of Appeal and in the House of Lords, in what has for shortness been called the *Blackpool Case.* (6) It is true that,

(1) [1908] A. C. 293.
(2) [1892] 1 Q. B. 357.
(3) [1907] 2 K. B. 256.
(4) Ibid. at p. 265.
(5) Ibid. at p. 270.
(6) [1907] 1 K. B. 568; [1909] A. C. 264.

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as between that case and the case before us, there are points of difference. In that case, as I understand it, the land was used solely for the purposes of a tramway; there was a raised way on rails which were laid upon sleepers, and there was also this difference, that there were words which declared that the tramroad was for the purposes of certain Acts "to be deemed to be a railway." But I do not think that the facts of that case are so far distinguishable as to make the decision inapplicable to the case we are now considering. One cannot read the judgments in that case without coming to the conclusion that one must in each case be guided by the particular facts, and if what you have got is a way for carriage by traction upon rails for all practical purposes indistinguishable from the way known as a railway for the carriage of passengers and goods by traction, then you have got that which fairly comes within the meaning of a "railway" for the purposes of s. 211. If that is the true reading of the decision of the *Blackpool Case* (1) in the Court of Appeal and the House of Lords, that decision governs this case, and, although neither Court may have expressly overruled the decision in the *Swansea Case* (2), it binds us inferentially to discard and overrule the earlier authority and to give judgment for the appellants.

WARRINGTON J. The appellants are the occupiers of, and work as one connected system, certain tramways and light railways which are constructed in and run along certain public roads. The question for our determination is whether in respect of that part of their system which is described as a "tramway" they are entitled to the exemption contained in s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875, the material part of which is in the following terms: "The occupier of any land covered with water, or used only as a canal or towing-path for the same, or as a railway constructed under the powers of any Act of Parliament for public conveyance, shall be assessed in respect of the same in the proportion of one fourth part only of such net annual value thereof." The substantial question for us is whether that part of the connected system which is described by the expression

(1) [1907] 1 K. B. 568; [1909] A. C. 264. (2) [1892] 1 Q. B. 357.

"tramways" is used by the appellants as a railway constructed under the powers of an Act of Parliament and for public conveyance. The words of the sub-section, no doubt, are "used only," and it has been suggested to us that, as tramways such as these are constructed in a street and are used for the ordinary purposes of a street, they are therefore not used "only" for the purposes described in an Act of Parliament. But I think that that argument is answered in the speech of Lord Loreburn in the *Wakefield Case* (1), where he says, "I think that the user there referred to is the user by the occupier who is to be rated." We have therefore to consider only the user of this way by the appellants; we must not consider whether it is a railway or a tramway or anything else, but whether it is used as a railway. The facts relating to that are to be found in paragraph 8 of the case, which has been read by Farwell L.J., and the result of the facts there stated is that the part of the system which is called a "tramway" and the part which is called a "light railway" are constructed in the same way and are used in the same manner. The same cars travel over the whole system, the gauge is the same, and there is no physical distinction between the "tramway" and the "light railway." It is beyond argument that the part of the system called the "light railway" is used, and used only, as a railway within the meaning of s. 211, sub-s. 1 (*b*), and, if that is so, it seems impossible to say that the other part of the system, which is used in identically the same manner, is not used as a railway. The Public Health Act, 1875, does not say that a railway shall have the exemption and a tramway shall not; all that it says is that land used in a particular way shall enjoy this particular exemption. In my opinion our decision depends entirely upon the statement of facts in the special case as to the user of the appellants' system. But it is said that there is a distinction, not indeed a physical one, but a distinction sufficient in law to deprive the tramway portion of this system of the benefit of the exemption; it is that in the one case the way was constructed under the Light Railways Act, and in the other case under the Tramways Act. But in the *Blackpool Case* (2) Gorell Barnes P. points out that the Public Health Act, 1875,

(1) [1908] A. C. at p. 294. (2) [1907] 1 K. B. 568.

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Warrington J.

says nothing as to the class of Act of Parliament under which the proposed way is to be constructed; it merely says that it is to be constructed under an Act of Parliament. It would, I think, be to introduce a false method of construction, if we were to read into the Act of 1875 a narrower meaning of the word "railway" than that which the Legislature has itself used.

No doubt we are faced with the difficulty caused by the decision in the *Swansea Case.* (1) But with all respect to the learned judge who delivered the judgment of the Court in that case, I fail to see how the reasoning upon which it is based can stand with the decision in the *Blackpool Case.* (2) I agree that the decision in the *Wakefield Case* (3) does not touch the *Swansea Case* (1); the ground of that decision was different. But the judgments in the *Blackpool Case* (2) did in reality touch and impeach the decision in the *Swansea Case* (1), and I think that Gorell Barnes P., in the passage which has already been quoted, did intend to dissent from the proposition that the question depends upon what I may call the legislative nature of the way rather than upon its physical character. And I cannot agree with the view expressed by Wills J. that no ordinary person has any difficulty in distinguishing between a tramway and a railway. In the present case it is obvious that no ordinary person, no person who did not know under which Act of Parliament the particular portion of the system was constructed, would be able to say whether the one or the other was a tramway or a light railway, for they are identical. For these reasons, I agree that this appeal must succeed.

Judgment for the appellants.

Solicitors for appellants: *Ashurst, Morris, Crisp & Co.*
Solicitor for respondents: *Francis Shelton.*

(1) [1892] 1 Q. B. 357.
(2) [1907] 1 K. B. 568; [1909] A. C. 264.
(3) [1908] A. C. 293.

W. J. B.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

K. B. D. 1911 *Oct.* 27, 28.
C. A. 1912 *March* 26, 27.

PEIZER *v.* LEFKOWITZ AND OTHERS.

Money-lender—Registered Name—Misdescription in Promissory Note—Business carried on in other than Registered Name—Money-lenders Act, 1900 (63 & 64 *Vict. c.* 51), *s.* 2, *sub-s.* 1 (*b*).

A money-lender registered in the name of the Wentworth Loan and Discount Office was described in a promissory note, given to her by a borrower as security for a loan, as the Wentworth Loan and Discount Company:—

Held, that the money-lender was not, by reason of the substitution of the word "company" for "office" in the promissory note, carrying on the business of money-lending in a name other than her registered name.

Decision of Divisional Court affirmed.

APPEAL of the defendants from the decision of the deputy judge of the Whitechapel County Court.

The plaintiff, Sara Peizer, was a registered money-lender, being registered in the name of the "Wentworth Loan and Discount Office, of 27 Strafford Houses, Wentworth Street, E." The plaintiff received from the defendants as security for a loan made by the plaintiff to the defendants two promissory notes for 50*l.* each signed by the defendants. The promissory notes were in the following form:—"Seven days after date or on demand we jointly and severally promise to pay to S. Peizer of the Wentworth Loan and Discount Company, of 27 Strafford Houses, Wentworth Street, E., or order the sum of fifty pounds for value received."

The plaintiff sued the defendants in the Whitechapel County Court to recover a balance due on the promissory notes. It was contended at the trial for the defendants that the effect of the substitution of the word "company" for the word "office" in the description of the plaintiff in the promissory notes was that the plaintiff was carrying on her money-lending business otherwise than in her registered name contrary to s. 2, sub-s. 1 (*b*), of the

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Money-lenders Act, 1900 (1), and that the transaction was therefore void, and that the plaintiff was not entitled to recover. The deputy county court judge held that the plaintiff was not carrying on her business otherwise than in her registered name, and he gave judgment for the plaintiff.

The defendants appealed.

Louis S. Green, for the defendants.

Harold Brandon, for the plaintiff.

1911. Oct. 28. BANKES J. In this case it has been contended before us that the deputy county court judge could not as a matter of law come to the conclusion at which he arrived. The appellants were bound to put their contention as high as that, for if it was admitted that the question was one of fact, and there was evidence to support the judge's decision, the appellants could not succeed upon this appeal. It seems to me that there were two points which the judge was entitled to consider. First, whether on the evidence there was any difference between the registered name of the plaintiff and the description of her given in the promissory notes. It seems to me to be quite plain that there may be differences between the registered name of a money-lender and the name or description under which a particular piece of business is transacted which do not amount to a variation. As an illustration I might suggest the case of a man whose name was Holland describing himself in a document as Holand. That illustration shews, I think, that the question must be one of degree and of the proper inference of fact to be drawn in each case as to whether the description used in a particular case amounts to such a difference as to compel the Court to say that the money-lender is carrying on his business in some other than his registered name.

In this case the only question upon which the deputy county

(1) Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 2:

"(1.) A money-lender as defined by this Act—

"(*a*) . . . .

"(*b*) shall carry on the money-lending business in his registered name, and in no other name and under no other description, and at his registered address or addresses, and at no other address; . . . ."

court judge was asked to give his decision was whether the use of the word "company" instead of "office" in the promissory notes was such a variance in the description of the plaintiff as to constitute a difference. I think it was open to the judge to say that the distinction between the two descriptions was so slight as not to amount to a difference. When this matter is being considered it may be that it is a proper test to apply to see whether or not the person who is entering into the transaction with the money-lender is likely to be deceived. I do not know whether that is the only test to be applied, but it seems to me to be a proper one; and it is clear that the deputy county court judge did apply that test before arriving at his decision, and I see no ground for interfering with his decision.

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There is another ground on which he might have decided the case, namely, that a single transaction was not sufficient evidence to compel him to come to the conclusion that the plaintiff was carrying on business in some other than her registered name. Each case must of course depend upon its own circumstances, but I am not prepared to say that the deputy county court judge would not in this case have been justified in holding that the defendants had not discharged the onus which lay upon them of proving that the money-lender was in fact carrying on business otherwise than in her registered name.

This appeal must be dismissed.

LUSH J. I am of the same opinion. The only point raised by this appeal is under s. 2, sub-s. 1 (*b*), of the Money-lenders Act, 1900. If the point had been taken that there had been a contravention of s. 2, sub-s. 1 (*c*), in that there was a discrepancy between the registered name of the plaintiff and the name in which the plaintiff had taken these promissory notes, I am not prepared to say that that was not such a discrepancy as was calculated to deceive, which is I think the true test. The deputy judge was, however, not asked to decide the case on that point and has not done so. He was only asked to decide whether the use of the word "company" instead of the word "office" constituted a breach of the provisions of s. 2, sub-s. 1 (*b*).

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Lush J.

It appears to me that there may come a point where a discrepancy is so violent that it is impossible to say as a matter of law that it does not amount to a variance; on the other hand it may be so slight, that it becomes a question of fact whether it is calculated to deceive or not. I think that the present case falls within the latter class, and that it is impossible for us to say as a matter of law that the deputy county court judge was wrong in holding that the variance was so slight as not to be calculated to deceive.

I only wish to say one thing further, and that is to point out a possible explanation of the existence in s. 2 of the Act of two clauses of so similar a character as (*b*) and (*c*). I think that if a particular transaction is carried out in a name which is not the money-lender's registered name, the borrower is enabled by clause (*c*) to have the transaction declared invalid. On the other hand, if a particular agreement is entered into in the right name, but the money-lender is in the habit of carrying on business in some other than his registered name, then the case comes within clause (*b*), and proceedings for the recovery of a penalty may be taken against the money-lender. In other words clause (*c*) relates to the vitiation of transactions and (*b*) to the liability of money-lenders to penalties. It is, however, not necessary to decide this point.

Appeal dismissed.

The defendants appealed. The appeal was heard on March 26, 1912.

Penney (*Louis S. Green* with him), for the appellants. The judgments in the Divisional Court proceeded on the basis that the difference between the use of the word "company" and the word "office" was so slight as not to be calculated to deceive the borrower. That is not the true test for deciding whether a money-lender is carrying on his business in a name other than that in which he is registered, for it involves reading into s. 2, sub-s. 1 (*b*), of the Act some such words as "except where the borrower is not misled." There is in fact a considerable difference between the word "company," a term implying a concourse of people, and "office," which imports an idea of locality.

"Registered name means de facto registered name": *Whiteman* v. *Sadler* (1), per Lord Dunedin. Further, there was in this case clearly a contravention of clause (*c*) of s. 2, sub-s. 1, and the transaction was therefore illegal, and although this point was not taken at the trial, this Court will take notice of the illegality: *Royal Exchange Assurance Corporation* v. *Sjoforsakrings Aktiebolaget Vega.* (2)

Harold Brandon, for the respondent. The object of s. 2, sub-s. 1 (*b*), was to enable the borrower to know exactly with whom he was dealing. There may be a variation from the registered name of so slight a character as to be a distinction without a difference, and whether that is so is a question of fact: *Kirkwood* v. *Gadd.* (3) The deputy county court judge found as a fact that there was no possibility of the defendants being deceived by the substitution of "company" for "office" and that the defendants knew perfectly well with whom they were dealing. His decision and that of the Divisional Court were right and ought not to be set aside. [He also referred to *Briggs* v. *Boss.* (4)]

Penney replied.

March 27. VAUGHAN WILLIAMS L.J. read the following judgment:—The only question in this case is whether a variance between the name of a money-lender as appearing as the payee on certain promissory notes taken by him from the borrower and his registered name constitutes a breach of the provisions of s. 2, sub-s. 1 (*b*), of the Money-lenders Act, 1900. The name as registered was the Wentworth Loan and Discount Office, of 27, Strafford Houses, Wentworth Street, E. The name on the promissory notes respectively was S. Peizer, of the Wentworth Loan and Discount Company, of 27, Strafford Houses, Wentworth Street, E. The only difference, therefore, was the substitution of the word "company" for the word "office."

The Money-lenders Act, 1900, s. 2, sub-s. 1 (*b*), provides that "a money-lender as defined by this Act shall carry on the money-lending business in his registered name, and in no other name and under no other description, and at his registered

(1) [1910] A. C. 514, at p. 527.
(2) [1902] 2 K. B. 384.
(3) [1910] A. C. 422.
(4) (1868) L. R. 3 Q. B. 268.

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Vaughan Williams L.J.

address or addresses, and at no other address." The Divisional Court held that there may be a variance between the registered name of a person carrying on business as a money-lender and the name in which a particular piece of business has been transacted which does not amount to a difference; that the question is one of degree in each case; and that upon the above facts the county court judge was justified in holding that the distinction between the two descriptions was so small as not to amount to a difference, and that consequently the transaction was not vitiated by s. 2, sub-s. 1 (*b*), of the Money-lenders Act, 1900.

In my opinion the finding of the county court judge was a finding in law and not in fact, and the Divisional Court and this Court could properly hear this appeal. I agree with the Divisional Court that there may be a variance between the registered name or description of a person and the name in which a person does a particular piece of business which does not constitute carrying on money-lending business in another name and under another description than that contained in his registered name. Bankes J. gives a variance in spelling as an instance where the variance would not vitiate the transaction. I think myself that the negative words in sub-s. 1 (*b*), "and in no other name and under no other description," are sufficient to vitiate the transaction in a case where there was a variance amounting to a breach of the section, but I think that the difference in the variance is a question of law and not of fact.

I agree that it was a question of degree, but I do not agree with the suggestion of Bankes J. when he says: "When this matter is being considered, it may be that it is a proper test to apply to see whether or not the person who is entering into the transaction with the money-lender is likely to be deceived." I do not think one can lay down a test. The degree of difference in each case must be determined on the variance between the words of the registered name and the words used in the particular piece of business. If I was using the test suggested by Bankes J. I should substitute the word "misled" for "deceived."

Now, it might be in the present case, it is possible, that the borrower reading the word "company" might draw a

different conclusion as to the constitution or membership indicated when the word "company" was substituted for the word "office." Lord Atkinson in *Kirkwood* v. *Gadd* (1) says: "In view of these facts there is not, there cannot be, a pretence for suggesting that the identity of the appellant was in any way concealed. The respondent knew his registered name, his registered address, and the nature of the business he purported to carry on there. These are the very things which it was, in my view, the design and purpose of the Money-lenders Act should be brought home to the knowledge of those who borrow from money-lenders. The special mischief against which that statute was directed does not exist in this case." It seems to me that it is true in the present case that there is no pretence for suggesting that the identity of the plaintiff was in any way concealed.

I decide, however, this case by itself in respect of the particular variance, and I by no means intend to say that words importing a different constitution of a firm from that indicated by the words in the registered name might not in some cases vitiate the transaction when used in the promissory note or other security taken by the money-lender. I think that this appeal must be dismissed.

FARWELL L.J. I agree that this appeal must be dismissed, and I agree with the view expressed by the judges in the Divisional Court that the distinction between the word "office" and the word "company" is in this connection a distinction without a difference. One of the objects of the Money-lenders Act, 1900, was to secure borrowers against the mischief of money-lenders carrying on business under a number of different names, an instance of which mischief occurred in the case of the notorious Isaac Gordon, who on one occasion stated that he carried on the business of a money-lender under a gross of aliases. The result of this practice was that borrowers frequently entered into transactions with a money-lender in ignorance of the fact that they had had previous transactions with the same man carrying on business under another name, and it was in order to put an end

(1) [1910] A. C. at p. 430.

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Farwell L.J.

to this practice that s. 2, sub-s. 1 (*b*), of the Money-lenders Act, 1900, was enacted. In *Kirkwood* v. *Gadd* (1) Lord James of Hereford said: "Guided by the words of the Act, I would surmise that the object of the Legislature was to preserve the identity of the money-lender so that borrowers might always know with whom they were dealing. To secure that the money-lender should trade in only one name, and carry on business at only one address, would do much, and has done much, to establish the desired personal identity of the persons with whom borrowers were dealing"; and in the same case Lord Shaw of Dunfermline said (2): "I must entirely agree with the judgment pronounced by my noble and learned friend Lord James of Hereford. It does appear to me that each case must depend upon its own facts, the elementary principle being kept in mind that the Act is to be enforced in all respects, and in no respect evaded."

I ask myself, therefore, whether the use of the word "company" instead of the word "office" is a distinction which is likely to mislead an intending borrower or to cause him to have any difficulty in ascertaining the identity of the money-lender with whom he was dealing. If there were any real possibility of a person being misled I agree that the provisions of s. 2, sub-s. 1 (*b*), would not have been complied with and that the transaction would be invalid, but, as I have already said, I think the substitution of the word "company" for the word "office" is a distinction without a difference and one which in my opinion could not possibly mislead any one.

KENNEDY L.J. I am of the same opinion and I entirely agree with the judgments which have been delivered and with the reasoning in them. It is important to bear in mind that the question whether the use by a money-lender of a name or description different from that which has been registered is such a non-compliance with the provisions of the Act as was intended by the Act to invalidate the particular transaction is a question of law just as the question of the materiality of an alteration in a bill of exchange or other negotiable instrument is a question of law. In deciding the question of law under the Money-lenders Act, the

(1) [1910] A. C. at p. 426. (2) Ibid. at p. 434.

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Court must of course base its decision on the ascertained facts of the particular case with which the Court is dealing, in the same way as the Court in considering the materiality of an alteration in a bill of exchange will have regard to the results which may flow from the alteration.

In the present case I am of opinion that there was no such variance from the registered name of the money-lender as would entitle the borrower to say that the transaction is invalidated.

Appeal dismissed.

Solicitors for appellants: *Osborn & Osborn.*
Solicitor for respondent: *Jonathan E. Harris.*

F. O. R.

DAVIES, APPELLANT *v.* BURRELL, RESPONDENT.

1912
April 24.

Adulteration—Sale of Food—Purchase for Analysis—Notification to Seller—Sale by Agent—Notification given to another Agent of Seller—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 14.

When an article of food has been purchased for the purpose of analysis by the public analyst, the notification of the intention to have the same analysed, required by s. 14 of the Sale of Food and Drugs Act, 1875, to be given "to the seller or his agent selling the article," may be given to an agent who has not sold the article.

CASE stated by a metropolitan police magistrate.

The appellant Davies was prosecuted by the respondent, an inspector of nuisances, for having sold by his agent, Mrs. Davies, to Chandler, the agent of the respondent, to the prejudice of the purchaser an article of food (margarine) which was not of the nature, substance, and quality of the article demanded (butter).

Chandler, the agent of the respondent, entered the appellant's shop and asked the appellant's wife, who was then the only person in the shop, for two ounces of butter, and was served by her with the article complained of. He then left the shop and handed the article purchased to the respondent, who was on the other side of the road. The two men thereupon went into the shop. The appellant's wife had left the shop, but his son and a

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servant came into the shop. The respondent in their presence divided the article into three parts and handed one part to the appellant's son, and stated to them that the article had been purchased for the purpose of analysis by the public analyst. The respondent did not notify to the appellant or his wife personally that it was his intention to have the article analysed and did not divide the article into three parts in the presence of the appellant or his wife or deliver one part to either of them personally.

The appellant contended that the prosecution must fail because the respondent had not complied with the requirements of s. 14 (1) of the Sale of Food and Drugs Act, 1875, in that he had not notified to the appellant or his wife personally the intention to have the article analysed and had not divided the article into three parts in the presence of the appellant or his wife.

The magistrate found that the article purchased was margarine. He found that the son or the servant was the agent of the appellant, and held that the requirements of s. 14 of the Act had been complied with by the notification to those agents of the intention to submit the article for analysis and by the delivery of one part of the article to the son, and accordingly convicted the appellant.

L. Sanderson, K.C., and *David Rhys*, for the appellant. Sect. 14 of the Sale of Food and Drugs Act, 1875, requires that the person purchasing any article with the intention of having it analysed must forthwith notify that intention "to the seller or his agent selling the article." The "agent selling" must mean the agent who in fact sells the particular article. The required

(1) 38 & 39 Vict. c. 63, s. 14: "The person purchasing any article with the intention of submitting the same to analysis shall, after the purchase shall have been completed, forthwith notify to the seller or his agent selling the article his intention to have the same analysed by the public analyst, and shall offer to divide the article into three parts to be then and there separated, and each part to be marked and sealed or fastened up in such a manner as its nature will permit, and shall, if required to do so, proceed accordingly, and shall deliver one of the parts to the seller or his agent.

"He shall afterwards retain one of the said parts for future comparison and submit the third part, if he deems it right to have the article analysed, to the analyst."

notification must, therefore, be given either to the seller personally or to his agent who has sold the article complained of. The "agent selling" is specified, and that precludes the words of the section being construed so as to make a notification to any other agent of the seller sufficient. This is a penal statute and must be strictly construed, and every requirement must be strictly complied with before a person can be convicted under it: *Barnes* v. *Chipp* (1); *Smart* v. *Watts* (2); *Hotchin* v. *Hindmarsh* (3); *Parsons* v. *Birmingham Dairy Co.* (4) The construction placed upon this section by the magistrate makes the words "or his agent selling" of no effect; they become mere surplusage.

S. G. Turner, for the respondent. In *Rouch* v. *Hall* (5) Field J. said that the object of the safeguards to the seller enacted in s. 14 is that "if the seller thinks fit he may procure an independent analysis." That object is attained by what was done in this case. There is nothing in the words of s. 14 to shew that a notification to an agent of the seller is insufficient. A notice to an agent is equivalent to notice to the seller himself; it is the duty of an agent to whom the notification is made to inform the seller at once. In Bowstead on Agency, 4th ed., p. 356, the law is thus stated: "Where any fact or circumstance, material to any transaction, business, or matter in respect of which an agent is employed, comes to his knowledge in the course of such employment, and is of such a nature that it is his duty to communicate it to his principal, the principal is deemed to have notice thereof."

This notification was made "forthwith" as required by s. 14: *Somerset* v. *Miller*. (6) The section contemplates the case of a shopkeeper who carries on his business by a manager and is never present himself. If the contention of the appellant is right, the statute could be evaded in cases of this kind by the seller, or his agent selling, always disappearing as soon as the inspector himself is seen.

Sanderson, K.C., in reply. The agent who buys for the inspector can himself at once give the notification and thus

(1) (1878) 3 Ex. D. 176.
(2) [1895] 1 Q. B. 219.
(3) [1891] 2 Q. B. 181.
(4) (1882) 9 Q. B. D. 172.
(5) (1880) 6 Q. B. D. 17, 19.
(6) (1890) 54 J. P. 614.

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prevent the suggested evasion of the Act. In *Rouch* v. *Hall*(1) Field J. was dealing with the procedure under another and different section.

AVORY J. In my opinion s. 14 of the Sale of Food and Drugs Act, 1875, means that the notification required to be given by the person purchasing an article may be given either to the seller or to the particular agent who has sold the article. The question in this case is whether that notification was given either to the seller or to his agent who in fact sold it. I think that there was evidence upon which the magistrate could properly come to the conclusion that the servant or the son of the appellant was his agent. There being evidence upon which the magistrate could come to the conclusion that the servant was an agent of the appellant and was in the shop to attend to customers if required, I am of opinion that the magistrate was right in holding that the required notification was given to the seller because it was given to his agent. The contention of the appellant would require that, in every case where an agent has sold, the notification shall be given to that agent. I cannot see anything in the words of the section which requires such a construction to be put upon it; such a construction would enable any one easily to defeat the objects of the Act. I think that the conviction was right and the appeal must be dismissed.

PICKFORD J. I regret that I must differ. I think that in this case a notification was not given as required by s. 14. Here the article in question was in fact sold by the appellant's wife and was sold to an agent of the inspector. The inspector's agent went out of the shop, and then the inspector and his agent went into the shop and gave the required notification to the son and a servant of the appellant. I quite agree that the servant was an agent of the appellant, and, if s. 14 were couched in such language as to make a notification to any agent of the seller sufficient, then this notification would be sufficient. But the words of the section are "to the seller or his agent selling the article," and I think that those words mean either to the seller

(1) 6 Q. B. D. 17.

himself or to one particular class of agent, that is, an agent who sells the article, and that a notification to another agent is not sufficient. If this construction would create any difficulty in applying the Act, I think that is a matter for the Legislature to remedy and is no ground for construing this section otherwise than in the way in which I think it ought to be construed.

LORD ALVERSTONE C.J. I am of opinion that this appeal fails. The contention of the appellant must go to the length of saying that, for the purposes of s. 14, the seller can have but one agent. I think that contention cannot be right. By a long series of decisions it has been established that both principal and agent are liable to conviction under the Act, and in the present case either might have been made liable to conviction. Therefore, in my opinion, it is impossible to hold that, because the agent who sold was absent from the shop, the other persons who were in the shop as agents of the seller were not agents to receive the prescribed notification. The magistrate has found as a fact that the son or the servant was an agent of the appellant, and there was evidence upon which he could rightly come to that conclusion. In my opinion, unless we can hold that the only agent to whom the notification can be given under s. 14 is the agent who sells, we cannot allow this appeal, and I think that we cannot so hold. For these reasons I am of opinion that this appeal must be dismissed.

Appeal dismissed.

Solicitor for appellant: *John T. Lewis.*
Solicitor for respondent: *A. M. Bramall.*

J. H. W.

1911
Nov. 28.

COOKE AND OTHERS *v.* COOPER AND OTHERS (JUSTICES OF BOLTON, LANCASHIRE).

Licensing Acts—Licence—Refusal to renew—Appeal—Death of Licensee—Right of Representatives to maintain Appeal—Persons aggrieved—Owners of Licensed Premises—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 & 1 *Geo.* 5, *c.* 24), *s.* 29.

Justices at a general annual licensing meeting refused to renew a licence to sell intoxicating liquors at a certain house on the grounds that the house had not been well conducted and that the fitness of the licence holder was unsatisfactory. The licence holder appealed to the quarter sessions. The owners of the house also appealed as being persons thinking themselves aggrieved by the refusal within the meaning of s. 29 of the Licensing (Consolidation) Act, 1910. Before the hearing of the appeal the licence holder died, and letters of administration were granted to his widow:—

Held, that the widow of the licence holder was entitled to maintain the appeal.

McDonald v. *Hughes* [1902] 1 K. B. 94, applied.

Held, also, that the owners of the house were "persons thinking themselves aggrieved by the refusal" within the meaning of s. 29 of the Licensing (Consolidation) Act, 1910.

CASE stated by the quarter sessions for the Salford Hundred division of the county of Lancaster held at Manchester.

1. The appellant Cooke was formerly occupier and licensee of certain licensed premises situate at Mealhouse Lane in the county borough of Bolton, and known as the Central Hotel. The appellants the Manchester Brewery Company, Limited, were and are owners of the same premises.

2. The appellants appealed to the Court of quarter sessions against the refusal of the respondents as justices acting in and for the county borough of Bolton at the general annual licensing meeting for the borough on February 8, 1911, to grant and renew to the appellant Cooke a justices' licence authorizing him to hold an excise licence to sell by retail intoxicating liquor at the licensed premises aforesaid.

3. The grounds of objection to the renewal of the licence were (*a*) that the licensed premises had been ill-conducted, and (*b*) that the fitness of the appellant Cooke was unsatisfactory.

4. Notice of appeal by each of the appellants against the refusal was duly served. The notice was dated February 11, 1911.

5. After service of the notice of appeal and before the hearing of the appeal, namely, on February 19, 1911, the appellant Cooke died.

6. On February 25, 1911, Margaret Cooke, widow of the appellant Cooke, applied to the justices for the borough for a temporary transfer to her of the licence in respect of the premises pending the hearing of the appeal and without prejudice to any question arising therein. The justices refused the application, and on March 4, 1911, the Court of Appeal made an order nisi calling upon the justices to shew cause why a writ of mandamus should not issue directed to the justices commanding them to hear and determine the application of Margaret Cooke according to law. These proceedings were still pending on April 10, 1911, when the appeal of the appellants came on for hearing before the Court of quarter sessions.

7. On March 11, 1911, letters of administration of the estate of the appellant Cooke were duly granted to Margaret Cooke.

8. Upon the hearing of the appeal it was objected by counsel for the respondents that by reason of the death of the appellant Cooke the licence in respect of the premises had become extinct, and that therefore no appeal lay from the refusal to renew the licence; and that the owners had no right of appeal as they were not persons aggrieved within the meaning of s. 29 of the Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24).

9. The licence held by the appellant Cooke came to an end by effluxion of time on April 5, 1911, and no licence was actually in existence at the time when the appeal came on for hearing.

10. The appellants by their counsel contended

(*a*) that the licence was not extinct and, on the contrary, that Margaret Cooke should for the purposes of the appeal be deemed to be in the position in which the appellant Cooke would have been if he had lived until the hearing of the appeal, and

(*b*) that in any event the appellants the Manchester Brewery Company, as owners of the premises, had a right of appeal, notwithstanding the death of the appellant Cooke.

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11. The Court of quarter sessions was of opinion that the objection taken by the respondents was correct in law, and that the appeal failed; accordingly, without fully hearing the evidence for the appellants, the Court dismissed the appeal subject to this special case stated for the opinion of the King's Bench Division.

The question for the opinion of the Court was whether the decision of the Court of quarter sessions was right in law.

Ashton, K.C. (*J. M. St. John Yates* with him), for the appellants. The Court of quarter sessions was in error in thinking that on the death of the appellant Cooke the licence became extinct. No doubt that is so as far as the dead man is concerned; but it is not extinct for all purposes. The effect of s. 65, sub-s. 7, of the Licensing (Consolidation) Act, 1910, which replaces s. 3 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), is that the licence continues to exist for a certain time, and that the representatives of the licence holder who carry on the business of the house are entitled to act as licensed persons until the next transfer sessions. The representatives may be held liable for offences against the licensing laws: *McDonald* v. *Hughes.* (1) It follows that they must be entitled to maintain an appeal against a refusal to renew. Then as to the Manchester Brewery Company, it is provided by s. 29 of the Licensing (Consolidation) Act, 1910, that any person who thinks himself aggrieved by the refusal of the licensing justices of any licensing district to grant a renewal, in cases where the power of refusal is vested in those justices, may appeal against the refusal to the Court of quarter sessions for the county in which the premises in respect of which the appeal is made are locally situated. It cannot be disputed that the owners of the licensed premises are persons aggrieved by a refusal to renew the licence.

The respondents did not appear.

LORD ALVERSTONE C.J. There is no reason why this case should not go back to the justices to be dealt with. The case is governed by the principle of the decision in *McDonald* v. *Hughes.* (1) On the death of a licence holder the licence is not absolutely void.

(1) [1902] 1 K. B. 94.

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It remains in existence for the purposes of the representatives of a deceased licensee getting a renewal in his place, and being held liable if they carry on the business in breach of the Licensing Acts. In my opinion this licence remains in existence for the purpose of enabling the representatives to maintain this appeal.

The Manchester Brewery Company have also, in my judgment, the right to maintain the appeal. The case must therefore go back to the quarter sessions.

HAMILTON and BANKES JJ. concurred.

Appeal allowed.

Solicitors for appellants: *Chester & Co., for Fielding & Fernihough, Bolton.*

W. H. G.

In re ATHERTON.

1912

March 28.

Bankruptcy—Debtor under Arrest—Fugitive Offender—Public Examination—Questions tending to criminate—Practice—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 17, 69—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *ss.* 8, 27.

A debtor, who is in custody or under remand on a criminal charge, is bound at his public examination in bankruptcy to answer all such questions touching his conduct, dealings, and property as the Court may put or allow to be put to him, even although the answers may incriminate him; and the scope of the inquiry is not limited by ss. 17 and 69 of the Bankruptcy Act, 1883, to offences under s. 11 of the Debtors Act, 1869, or in connection with his bankruptcy, but extends to all matters which the Court may take into consideration under s. 8 of the Bankruptcy Act, 1890, on the application for his discharge.

The usual practice of not pressing such questions in relation to the alleged offence while the criminal charge is hanging over the debtor, but of adjourning the public examination until after the trial, is only a rule of convenience.

THIS was a matter arising on the public examination of the debtor and referred by the registrar to the judge for directions in these circumstances.

On February 27, 1912, the debtor presented his own petition in the Chester County Court, on which a receiving order was

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made on March 2, and the same day he was adjudicated bankrupt. His public examination was fixed for March 27.

A few days before the receiving order the debtor had been arrested in London under the Fugitive Offenders Act, 1881, on a criminal charge by his late employers, the Dominion Express Company of Canada, and was under remand at Brixton Gaol pending proceedings before a magistrate at Bow Street for his extradition to Canada. It was alleged that he had been entrusted by his late employers with a large number of postal orders and cheques and had forged the signatures and converted the proceeds to his own use.

The public examination of the debtor was held at the London Bankruptcy Court under the provisions of s. 118 of the Bankruptcy Act, 1883, and the debtor was examined by Mr. Hugh-Jones, the official receiver of the Chester County Court. In the course of the examination the official receiver proposed to put the following question to the debtor:—"Were you entrusted by the Dominion Express Company on your last voyage to England with a large quantity of money orders and cheques?" The registrar allowed the question, but the debtor refused to answer it on the ground that he was under remand in respect of extradition proceedings which related to his connection with the company. Thereupon the registrar adjourned the public examination to April 1, and reported the debtor's refusal to the judge, stating that the practice in London was, when a bankrupt was in custody or under remand on a criminal charge, not to press such questions while the charge was hanging over him, but to adjourn the public examination until after the trial; and that such practice could not be followed in the present case owing to the possibility of the bankrupt being removed to Canada. The official receiver was willing to undertake that the answers given in the public examination should not be used in the extradition proceedings.

The matter now came before the judge.

Macaskie, for the debtor. When a debtor is under arrest on a criminal charge he ought not to be compelled to answer questions which may cause his conviction. On the true

construction of ss. 17 and 69 of the Bankruptcy Act, 1883, the wide powers of examination given to the official receiver in relation to offences are confined to matters arising under s. 11 of the Debtors Act, 1869, or to felonies or misdemeanours in connection with his bankruptcy which the Court would have to take into consideration under s. 8 of the Bankruptcy Act, 1890, on his application for his discharge: *In re Hedley.* (1) But with respect to offences that do not come within the scope of those enactments it is submitted that the debtor is entitled to rely on the legal maxim that a man is not bound to criminate himself. Here the alleged offence is not connected with his bankruptcy.

[PHILLIMORE J. Do not the last words in sub-s. 1 of s. 69 entitle the Court to investigate an alleged offence outside the Debtors Act, 1869, if it would affect the decision of the Court in refusing, suspending, or qualifying the discharge?]

That might be so if the offence concerned the debtor's property, but here the cheques and money orders were the property of the company, and the official receiver could not claim them as part of the assets of the debtor divisible amongst his creditors. [He also referred to s. 27 of the Bankruptcy Act, 1890.]

Mr. Hugh-Jones in person. Sect. 17 of the Act of 1883 and s. 27 of the Act of 1890 clearly shew that the debtor must answer all questions as to his conduct, dealings, and property that the Court may allow to be put to him. His general conduct is part of the materials to be placed before the Court on his application for his discharge. Sect. 69 does not limit the scope of the inquiry, and the proviso in s. 8 of the Act of 1890 is wide enough to include any felony or misdemeanour. The matter was discussed in *Reg.* v. *Scott* (2), *Reg.* v. *Erdheim* (3), and *In re a Solicitor.* (4) Those decisions shew that the debtor is bound to answer questions which the Court allows to be put and which may criminate him, and that the common law principle relied on does not apply to an examination in bankruptcy. Further, the usual practice not to press such questions is not applicable here, because the debtor may leave the country and may not return.

Macaskie in reply. *Reg.* v. *Scott* (2) related to an offence against

(1) [1895] 1 Q. B. 923.
(2) (1856) 25 L. J. (M.C.) 128.
(3) [1896] 2 Q. B. 260, 267, 268.
(4) (1890) 25 Q. B. D. 17, 25.

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the existing bankruptcy law. *Reg.* v. *Erdheim* (1) was a decision under s. 11 of the Debtors Act, 1869, and neither in that case nor in the case of *In re a Solicitor* (2) was s. 69 referred to.

PHILLIMORE J. This is a question which has arisen out of the public examination of a debtor under s. 17 of the Bankruptcy Act, 1883, which provides in sub-s. 1 that the debtor "shall be examined as to his conduct, dealings and property," and in sub-s. 8 that "it shall be his duty to answer all such questions as the Court may put or allow to be put to him." Those words are in themselves wide enough for the purpose of the matter now before me, but I have also the authority of the cases of *In re a Solicitor* (2), *Reg.* v. *Erdheim* (1), and *Reg.* v. *Scott* (3), which decide that those words mean what they say, that a debtor is bound to answer all such questions as the Court may put or allow to be put to him, whether they tend to criminate him or not—even such a question as "Have you committed a crime?" Reference has been made to s. 27 of the Act of 1890, but it does not help the contention on behalf of the debtor. Sect. 85 of the Larceny Act, 1861, had provided that no person should be liable to be convicted of certain misdemeanours (being frauds by agents, bankers, or factors) if he should have first disclosed the same under any compulsory examination in bankruptcy, and sub-s. 1 of s. 27 removes out of that class of exceptions all cases of statements made by a bankrupt under compulsion in bankruptcy, which confirms the view that he can be compelled to answer questions which may tend to criminate him; and sub-s. 2 of that section also does not protect him from disclosing, The only really strong contention put forward on behalf of the bankrupt is that ss. 17 and 69 of the Act of 1883 must be read together, and that s. 69 limits the powers of the official receiver in examining the debtor under s. 17. Sect. 69 provides that it shall be the duty of the official receiver to investigate the conduct of the debtor and to report to the Court whether there is any reason to believe that the debtor has committed any act which constitutes a misdemeanour under the Debtors Act, 1869, or under the

(1) [1896] 2 Q. B. 260. (2) 25 Q. B. D. 17.
(3) 25 L. J. (M.C.) 128.

Bankruptcy Act, 1883, and it is said that his duties are confined to examining as to offences under those Acts and that it is no part of his business to ask questions as to charges of criminal misconduct that do not come within the scope of those Acts. But I see no reason for supposing that the declaration of the official receiver's duties in s. 69 in any way limits the powers of general investigation into conduct given by s. 17. All that can be said is this, that the powers under s. 69 are not quite as wide as those under s. 17, but they are not in conflict. That being so, I see no reason why the bankrupt in this case should not answer the questions which the official receiver proposes to put to him.

The point was very properly raised by the registrar and referred to me, because the practice in London has been, where a debtor is in custody or under remand on a criminal charge, not to press such questions while the charge is hanging over the bankrupt, but to adjourn the public examination until after the trial. But such a rule may, as has been pointed out, lead to mischief where it might be necessary to examine at once in order to trace assets which might be lost if prompt measures were not taken. It is, anyhow, only a rule of convenience and tenderness, and, though I hope it will be followed generally both in London and in the country, there may be occasions where it will be desirable not to follow it. Such an occasion would occur where the bankrupt is likely to be extradited or to be handed over to colonial authorities under the Fugitive Offenders Act. In such a case the bankrupt might leave the country and perhaps not come within the jurisdiction again. There it would be the duty of the official receiver to examine him before he leaves the country.

Historically the rule that a man cannot be compelled to answer questions tending to criminate him has never, so far as I am aware, been applied to the case where the alleged crime has not been committed within the jurisdiction of English law or on British soil. Crimes committed abroad are not, with few exceptions, crimes at home. A crime committed in a colony is for this purpose in the same position as a crime committed in France, or Germany, or in any other foreign country, and I know of no

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principle which will enable a man to protect himself on the ground that he fears criminal proceedings in some other country.

Then it is said that the official receiver was really exceeding his duties because he was not examining the debtor as s. 17 coupled with s. 69 provided. But as to that the official receiver has a right to examine the debtor generally as to his conduct, dealings, and property to ascertain whether he has done anything which the Court may have to take into consideration on his application under s. 8 of the Act of 1890 for his discharge and which would justify a refusing or suspending or qualifying of an order of discharge, and the crime charged in this case is one which the Court would probably take into consideration upon an application for discharge. Apart from that, the official receiver has power to ask questions relating to the dealings and property of the bankrupt, and in the present case it is alleged that the debtor has turned into money postal orders and other valuable securities, and these things are prima facie part of the assets in the bankruptcy. It may be that orders for restitution will be made, or it may be that applications to follow these assets as trust property will succeed, but unless and until such orders are made the property which the debtor has acquired by conversion forms part of his estate, and he is not in a position to say that it does not. I hold, therefore, that the official receiver is entitled, as he has claimed, to put questions to the debtor with regard to tracing any of these assets and to elicit any matters affecting his conduct that may be relevant, and I must order the debtor to answer the questions.

Macaskie. I am instructed that fifteen days must elapse after the order of the magistrate before extradition. Will your Lordship postpone the examination until after the order of the magistrate?

PHILLIMORE J No. I do not think that such a postponement will be convenient or desirable. The magistrate will only look at the depositions. The official receiver, so far as he properly may, will not communicate the result of the examination to the police. He is not to go out of his way to furnish the

police here with facts before the magistrate has committed. That is all I can say.

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Solicitors for the debtor: *Lloyd, Richardson & Co.*

H. L. F.

In re HART.

Ex parte GREEN.

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April 1.

Bankruptcy—Voluntary Settlement—Bankruptcy of Settlor—Sale by Voluntary Donee after Act of Bankruptcy—Purchaser for Value without Notice—Title of Trustee—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 47.

Where a voluntary settlement by virtue of s. 47 of the Bankruptcy Act, 1883, becomes void as against the trustee in bankruptcy of the settlor, and the title of the trustee relates back to an act of bankruptcy committed by the settlor previous to a sale by the donee under the voluntary settlement to a purchaser for value without notice of the act of bankruptcy, such purchaser acquires no title and cannot hold the property as against the trustee in bankruptcy.

The principle of *In re Carter and Kenderdine's Contract* [1897] 1 Ch. 776, applied.

THIS was an application in which the trustee in bankruptcy claimed certain shares as part of the property of the bankrupt in these circumstances.

On October 14, 1909, the debtor transferred 250 fully paid up shares of 1*l.* each in the Hart Accumulator Company, Limited, to his daughter, Miss Hart, who was living with him. The transfer was in common form and on the face of it for a nominal consideration. Subsequently the debtor and his daughter, when examined in his bankruptcy, alleged that the transfer was made for services rendered.

Prior to the date of this transfer the debtor was owing a Mr. Green sums of 301*l.* 12*s.* 5*d.* and 180*l.* 3*s.* 3*d.* on overdue acceptances for the payment of which he was being pressed, and eventually on September 24, 1909, Mr. Green issued two writs in the King's Bench Division against the debtor for the amounts due on the two acceptances and obtained judgment on both writs on February 17, 1910.

On March 31, 1910, the debtor committed an act of bankruptcy

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by failing to comply with a bankruptcy notice based on the two judgments, and that had been served upon him on the previous March 15.

On April 4, 1910, Mr. Green presented a bankruptcy petition against the debtor, the act of bankruptcy alleged being the failure of the debtor to comply with the bankruptcy notice, and on April 22, 1910, a receiving order was made against him. Adjudication followed, and eventually Mr. Green became the trustee.

In the meantime, on April 13, 1910, Miss Hart sold and transferred the 250 shares in the Hart Accumulator Company, Limited, for 187*l.* 10*s.* to Flora Lomas, who purchased them in good faith and without any knowledge of the financial position of the debtor or of the act of bankruptcy he had committed.

The trustee now moved against Flora Lomas for an order (1.) declaring that the transfer of October 14, 1909, of the 250 shares was void as against him under s. 47 of the Bankruptcy Act, 1883; (2.) declaring that the transfer of the same shares on April 13, 1910, to Flora Lomas was void as against him on the ground that his title had accrued prior to the date of such transfer; and (3.) for an order directing Flora Lomas to execute a transfer of the same shares to him and to pay over to him all dividends on the shares received by her.

Miss Hart was also made a respondent to the notice of motion, but was informed that she was merely a formal party and that no costs would be asked for against her.

F. Mellor, for the trustee. On the evidence the transfer of shares by the bankrupt to his daughter was a voluntary settlement, and the sale to Flora Lomas of April 13, 1910, is not a protected transaction within s. 49 of the Act because it was not a dealing with the bankrupt. The authorities on s. 47 of the Act shew that the settlement is not void ab initio, but voidable by the trustee in bankruptcy if the settlor becomes bankrupt within the two years after the settlement: *In re Vansittart* (1); *In re Brall* (2); *In re Carter and Kenderdine's Contract* (3); and the

(1) [1893] 2 Q. B. 377. (2) [1893] 2 Q. B. 381.
(3) [1897] 1 Ch. 776.

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words "become bankrupt" in the section refer to the commencement of the bankruptcy: *In re Reis.* (1) The cases of *In re Vansittart* (2) and *In re Brall* (3) may be cited against the trustee on the position of a purchaser for value without notice, but in both of them the transaction which was assailed took place *before* the commencement of the bankruptcy.

[*E. W. Hansell*, for Flora Lomas. The report of *In re Vansittart* (2) in the *Law Reports* differs in a material date from the report in Morrell's Reports. (4) In the *Law Reports* the date of the service of the bankruptcy notice is given as October 23, but in Morrell the date is said to be October 19. If the latter date is correct, then the act of bankruptcy in that case was complete three days *after* the date of the transaction impeached and the case is a direct authority in favour of the transferee.]

[The Court sent for the file of the proceedings in *In re Vansittart*, from which it appeared that the bankruptcy notice was issued on October 19 but was not served until October 23, so that the date given in the *Law Reports* was correct.]

The trustee relies on the dictum of A. L. Smith L.J. in *In re Carter and Kenderdine's Contract* (5) that the settlement is void against the trustee in the bankruptcy from the date of the accruer of his title, that is to say, void from the date of the act of bankruptcy to which his title relates back. Here the title of the trustee relates back to the act of bankruptcy committed on March 31, 1910. As from that date the settlement was void against him and the shares became his property.

E. W. Hansell, for Flora Lomas. It is submitted that there is sufficient evidence to support the transfer of October 14, 1909, as a settlement for value. But assuming it to be a voluntary settlement, it raises the point, not yet decided, whether, even if the title of the trustee relates back to a date anterior to a transaction for value that is impeached, such a transaction for value without notice is not perfectly good. *In re Carter and Kenderdine's Contract* (6) decided that a voluntary settlement is void against the trustee in bankruptcy from the date of the accruer of

(1) [1904] 1 K. B. 451.
(2) [1893] 2 Q. B. 377.
(3) [1893] 2 Q. B. 381.
(4) 10 Morr. 44.
(5) [1897] 1 Ch. 776, 782.
(6) [1897] 1 Ch. 776.

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his title, but it does not decide that the settlement is void as against a purchaser for value without notice from the donee under the settlement. The earliest moment at which the trustee can impeach the transaction is from the date of his appointment: s. 54. The fact that his title relates back makes no difference. The Court must so construe s. 47 as not to destroy the title of a bona fide purchaser for value without notice unless driven to it by express statutory enactment. (1) It is submitted there is nothing in the Act which says so. Further, there is the dictum of Vaughan Williams J. in *In re Brall* (2) that "the moment it is assumed that the settlement is not void ab initio, all those authorities apply which decide under 27 Eliz. c. 4 that a purchase for valuable consideration from a person making title under a voluntary conveyance relates back so as to prevent the original conveyance being a voluntary conveyance within the meaning of the Act": May on Voluntary Conveyances, 3rd ed., pp. 252, 253; *Prodgers* v. *Langham* (3); *Low* v. *McGill* (4); *George* v. *Milbanke* (5); *Daubeny* v. *Cockburn* (6); *Sanguinetti* v. *Stuckey's Banking Co.* (7); *In re Farnham* (8); *Morewood* v. *South Yorkshire Railway, &c. Co.* (9)

Miss Hart did not appear.

PHILLIMORE J. The first question is whether the transfer of October 14, 1909, by the bankrupt to his daughter of the shares held by him was or was not a voluntary settlement. Having heard the evidence I hold that it was a voluntary settlement. That being so, I have to determine the important question whether a bona fide purchaser for value without notice from the donee under a voluntary settlement is under the circumstances of this case entitled to hold the property. The dates are all-important. [The learned judge stated the dates, and continued:] After the act of bankruptcy and the presentation of the petition, but before the receiving order, the transfer to Flora Lomas was made. The

(1) [1897] 1 Ch. 776, 784.
(2) [1893] 2 Q. B. 381, 385.
(3) (1663) 1 Sid. 133.
(4) (1864) 12 W. R. 826.
(5) (1803) 9 Ves. 190.
(6) (1816) 1 Mer. 626.
(7) [1895] 1 Ch. 176.
(8) [1895] 2 Ch. 799.
(9) (1858) 3 H. & N. 798.

trustee's title relates back to the act of bankruptcy. If, therefore, it cannot be asserted against her, if she is entitled to hold the shares, any one who, even after the appointment of the trustee, takes property bona fide and for value from the donee under a voluntary settlement is entitled to hold it. It is therefore a very important question. No doubt it is a hardship that such persons shall have no protection, and not be within s. 49 of the Bankruptcy Act, 1883, but the answer is that they are in the same position as others who buy chattels from the apparent owner of them without a title to them. The case is not as hard as that of a pawnbroker taking chattels which are pledged by a thief. I must consider s. 47 and the authorities. [The learned judge read the section, and continued:] It has been decided by the Court of Appeal in the case of *In re Carter and Kenderdine's Contract* (1) that this section does not mean that a voluntary settlement is void ab initio and that conveyances and transfers by the donee under it before the commission of an act of bankruptcy shall be impeachable, but that until at any rate the title of the trustee accrues the settlement must be deemed to be de facto good, and that the property so settled can be transferred for value. The decision rests on these grounds: the statute means not that the settlement shall be absolutely void, but that it shall be voidable against the trustee in bankruptcy, and therefore, at the time when the settlement is made, non constat that there ever will be a trustee in bankruptcy, and accordingly people are entitled to deal on the faith of the settlement and maintain their dealings unless and until bankruptcy supervenes within the statutory period. Here there is a trustee in bankruptcy within two years of the date of the settlement, and his title relates back to the act of bankruptcy committed on March 31, 1910, and, since it is agreed on all hands that he can assert it from the commencement of the bankruptcy, I have to determine whether at the time when the bankrupt's daughter purported to transfer the shares to Flora Lomas she had any shares to assign. In my opinion the language of the judges in *In re Carter and Kenderdine's Contract* (1), though the point was not decided in that case, makes it clear that she had no property to assign. Then there are the two earlier cases of

(1) [1897] 1 Ch. 776.

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In re Vansittart (1) and *In re Brall* (2), and I take the opportunity to say that the dates as given in the report of *In re Vansittart* in the *Law Reports* are correct, and that there is an unfortunate mistake in the report in Morrell's Reports, arising from some inadvertence. The matter turns on this. The report in Morrell gives the date of the issue of the bankruptcy notice, but omits to give the date of its service from which the subsequent dates run. Taking the case as correctly reported in the *Law Reports*, both it and *In re Brall* (2) were cases in which the transfer took place before the act of bankruptcy was committed, and they are valuable as meeting the decision which had been given by Stirling J. in *In re Briggs and Spicer* (3), that a voluntary settlement is void ab initio. The cases of *In re Vansittart* (1) and *In re Brall* (2) support the view ultimately taken by the Court of Appeal in *In re Carter and Kenderdine's Contract* (4) that the settlement is voidable against the trustee only, and is therefore not void till there is a trustee and his title relates back. Now *In re Carter and Kenderdine's Contract* (4) only decides that until an act of bankruptcy has been committed a purchaser can safely take property from the donee under a voluntary settlement. But the language and reasoning of the judges shew that the Court was necessarily of the opinion, expressed by all the three judges, that directly an act of bankruptcy has been committed no subsequent transfer can be upheld, even though it be bona fide and for value. The argument which succeeded on the appeal, as reported in the *Law Reports*, proceeded on this—that "void" does not mean void as against every one from the date of the instrument, but only void as against the trustee in bankruptcy, and from the time when his title accrues. I cite that from the argument because the judgment of Lindley L.J. is not as explicit as those of the other judges. But after referring to s. 47 he says this at p. 780: "Looking at the language only, it seems to me that when an enactment says a settlement 'shall be void against the trustee in bankruptcy' it does not mean that it shall be void before there is a trustee in bankruptcy." On the other hand, A. L. Smith L.J. is extremely explicit. He says

(1) [1893] 2 Q. B. 377; 10 Morr. 44.
(2) [1893] 2 Q. B. 381.
(3) [1891] 2 Ch. 127.
(4) [1897] 1 Ch. 776.

at p. 782 : " I read the section in this way : any settlement of property shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in bankruptcy. Void from when ? That is the point which has to be determined. On one side it is said it is void ab initio—void from the date of the settlement. Where do you find that? The words are not there. There are other words which point in the contrary direction, and those are the words ' void against the trustee in the bankruptcy.' What do they mean ? They mean void as against the trustee in the bankruptcy from the date of the accruer of his title, or, in other words, void from the date of the act of bankruptcy to which the title of the trustee relates back. That, in my judgment, is the true construction of that part of the section." Similarly, Rigby L.J. says (p. 784) : " I think we must construe the section as meaning that the voluntary settlement shall not stand in the trustee's way, that that alone shall not exclude him from laying his hand upon any property comprised in it, so that if the person in possession has no other title than that which is given by the voluntary settlement that title will not avail him against the trustee. I think the reasonable contention is this : that if anything has been done under the settlement, if, for instance, rents have been paid, there can be no account of them—if, going to the extreme, the property has been sold out and out in a bona fide way for valuable consideration, the trustee cannot go against the purchaser at all." Mr. Hansell in his argument referred to a passage in the judgment of Vaughan Williams J. in *In re Brall* (1) and relied on the authority of cases decided on 27 Eliz. c. 4. One of such cases, relating to a bill of sale, was *Morewood* v. *South Yorkshire Railway and River Dun Co.* (2) In that case, in dealing with circumstances which it is not necessary otherwise to detail, Watson B. says : " The question is whether my brother Bramwell ought to have left it to the jury to say whether the bill of sale to Watson was fraudulent or not. The conveyance was only void as against creditors." So I say here, if, before the commission of any act of bankruptcy, the property had passed from the bankrupt's daughter to Flora Lomas

(1) [1893] 2 Q. B. 381, 385. (2) 3 H. & N. 798.

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HART, *In re.* GREEN, *Ex parte.*

Phillimore J.

the transaction would have been good. But it had not; and since it had not, the trustee, in the language of Rigby L.J. in *In re Carter and Kenderdine's Contract* (1), is entitled to treat the settlement as if it were not in his way and to say that the property is his and that the voluntary settlement does not exclude him from laying his hand upon any property comprised in it. I hold, therefore, that the shares were the property of the trustee at the time they were transferred to Flora Lomas, and that he is entitled to the declarations for which he asks and to an order directing Flora Lomas to execute a transfer of the shares to him and to deliver to him the certificates of the shares.

F. Mellor. I also ask that the order may include a direction that Flora Lomas shall pay over the dividends she has received on the shares.

PHILLIMORE J. No. I will make no order on Flora Lomas to hand over the dividends she may have received on the shares.

Solicitor for trustee: *James Turner.*

Solicitors for Flora Lomas: *Geare & Willis, for W. Tottle, Sheffield.*

(1) [1897] 1 Ch. 776, 784.

H. L. F.

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Revenue—Income Tax—Lands, Tenements, or Hereditaments—Waterworks—Annual Value—Profits—Rural District Council—Supply of Water to Contributory Places—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 60, *Sched.* (*A.*), *No. III.*; *s.* 100, *Sched.* (*D.*); *s.* 101 — *Revenue Act*, 1866 (29 & 30 *Vict. c.* 36).

A rural district council under the powers conferred by the Public Health Act, 1875, supplied water to a number of contributory places. To some of these places the water was supplied at a profit, and to others at a loss, to the council. In assessing the council under No. III. of Sched. (A.) to s. 60 of the Income Tax Act, 1842, in respect of the annual value or profits of waterworks, the surveyor of taxes took into account only those dealings which shewed a profit, on the ground that the undertaking of supplying water was in respect of each contributory place a separate undertaking or concern :—

Held, that the undertaking of supplying water was not in respect of each contributory place a separate concern, but that the waterworks as a whole constituted one concern, and that the council was to be charged upon the balance of profits over losses.

By s. 8 of the Revenue Act, 1866, the concerns described in No. III. of Sched. (A.) of the Income Tax Act, 1842, are to be charged and assessed in the manner in the said No. III. mentioned according to the rules prescribed by Sched. (D.) of the same Act of 1842 so far as such rules are not inconsistent with No. III. of Sched. (A.) :—

Held, that this enactment does not constitute persons engaged in the concerns described in No. III. of Sched. (A.) "persons carrying on concerns in the nature of trade the profits whereof are made chargeable under the rules of Sched. (D.)" within the meaning of s. 101 of the Act of 1842 so as to entitle them under that section to set against the profits acquired in one or more of those concerns the excess of the loss sustained in any of the other concerns over and above the profits thereof.

Case stated by the Commissioners for the General Purposes of the Income Tax Acts for the Lower Agbrigg Division of the West Riding of Yorkshire.

It is thought well before setting out the case to state shortly the effect of certain sections of the Public Health Act, 1875

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(38 & 39 Vict. c. 55), with a view to the better understanding of the points raised in the case.

By s. 51 of that Act any rural authority may provide their district or any contributory place therein, or any part of any such contributory place, with a supply of water proper and sufficient for public and private purposes, and for those purposes or any of them may—

(1.) Construct and maintain waterworks, dig wells, and do any other necessary acts; and

(2.) Take on lease or hire any waterworks, and (with the sanction of the Local Government Board) purchase any waterworks, or any water or right to take or convey water, either within or without their district, and any rights, powers, and privileges of any water company; and

(3.) Contract with any person for a supply of water.

By s. 229, the expenses incurred by a rural authority in the execution of the Act are to be divided into general expenses and special expenses.

Special expenses are the expenses of the construction, maintenance, and cleansing of sewers in any contributory place within the district, the providing a supply of water to any such place, and maintaining any necessary works for that purpose, if and so far as the expenses of such supply and works are not defrayed out of water rates or rents under the Act.

Where the rural authority make any sewers or provide any water supply or execute any other work under the Act for the common benefit of any two or more contributory places within their district, they may apportion the expense of constructing and maintaining the work, in such proportions as they think just, between the contributory places, and any expenses so apportioned to any contributory place are to be deemed special expenses legally incurred in respect of that contributory place.

Special expenses are to be a separate charge on each contributory place.

By s. 230, for the purpose of obtaining payment from the several contributory places of the sums to be contributed by them, the rural authority issue their precept to the overseers of

each contributory place requiring the overseers to pay, within a time limited by the precept, the amount specified in the precept to the rural authority or to some person appointed by them.

The overseers must comply with the requisitions of the precept by levying a separate rate in the same manner as if it were a rate for the relief of the poor.

The Wakefield Rural District Council appealed against the following assessments to income tax (after deduction had been made in respect of establishment charges) made upon them under r. 3 of No. III. of Sched. (A.) to s. 60 of the Income Tax Act, 1842 (1), for the year 1909–10, namely :—

	Profits.		
Waterworks for the Parish of	£	*s.*	*d.*
Alverthorpe cum Thornes .	60	0	0
Crigglestone	14	10	0
Crofton	134	0	0
Sharlston	139	0	0
	£347	10	0

The following facts were proved or admitted :—

1. These assessments were based upon the profits of the various waterworks above mentioned of the Wakefield Rural District Council as traders in water, taking into account only the parishes within the rural district in which a profit was made in trading in water as shewn by the accounts for the year ending March 31, 1909, but ignoring altogether the parishes in which a loss was made, and there was no dispute as to the correctness of the amounts except as hereinafter stated.

2. The appellants are the local authority for the district known as the Wakefield Rural District, which comprises the above-mentioned parishes and also the parishes of Bretton West, Chevet, Lupset, Newland, Shitlington, Warmfield, and Walton, and the council have in pursuance of the powers granted to them by the

(1) See note on p. 279, post.

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Public Health Act, 1875, undertaken the supply of water to each of the following parishes comprised in their district:—

Alverthorpe cum Thornes	—Supply established	. .	1889
Bretton West	. . „	„ . .	1898
Crigglestone	. . . „	„ . .	1889
Crofton	. . . „	„ . .	1891
Sharlston	. . . „	„ . .	1889
Walton	. . . „	„ . .	1891
Warmfield	. . . „	„ . .	1890
Shitlington	. . . „	„ . .	1880
Lupset	. . . „	„ . .	1889

3. Each one of these parishes is a contributory place within the meaning of ss. 51 and 229 of the said Act.

4. The working of the water supplies for the parishes of Bretton West, Lupset, and Shitlington for the year 1908-9 without any deduction for establishment charges resulted in losses as follows:—Bretton West 6*l.* 10*s.* 8*d.*, Shitlington 49*l.* 8*s.* 5*d.*, Lupset 10*l.* 7*s.* 10*d.*; total 66*l.* 6*s.* 11*d.* In the parishes of Walton and Warmfield the receipts balanced with the expenditure after the proper deduction for establishment charges. Nothing is included in the assessments of 347*l.* 10*s.* in respect of Bretton West, Shitlington, and Lupset. There was no assessment in respect of Bretton West, Shitlington, and Lupset.

5. The water supplied to all the above-mentioned parishes is purchased in bulk by the appellants from the Wakefield Corporation under an agreement dated February 27, 1889.

6. The rents for water supplied are paid by the consumers only according to a scale for each contributory place.

7. Any deficiency resulting from the working of the water supply in a parish in any year is raised by a special expenses rate levied upon all the ratepayers of that parish in accordance with ss. 229 and 230 of the Public Health Act, 1875, and any surplus that may arise is carried forward to the credit of the parish to meet the cost of such supply for any following year.

8. The rates of each of the following contributory places, namely, Bretton West, Crigglestone, Crofton, Sharlston, Walton, Warmfield, and Shitlington, are separately mortgaged to the

Public Works Loan Commissioners to secure sums of money that were advanced in order to provide the water supply.

9. Separate accounts are by law required to be kept for the water supply in each contributory place. The appellants have no power to divert and as a matter of fact never have diverted the profits arising from the water supply in any parish for the benefit of any other parish, or levied any deficiency elsewhere than in the parish where the deficiency arose, but have always carried forward any surplus to the credit of the parish where that surplus arose.

10. The following is a copy, omitting immaterial portions, of the notice of assessment served on the appellants.

"Notice of Assessment under Schedule D (No. III. Schedule A) of the Income Tax Acts, in respect of the annual value or profits arising from the following concerns, viz:—

"List No. 1. Quarries of stone, slate, limestone or chalk, iron-works, gas works, salt springs or works, alum mines or works, water works, streams of water, canals, inland navigations, docks, drains and levels, fishings, rights of markets and fairs, tolls, ways, bridges, ferries, cemeteries, and other concerns of the like nature, from or arising out of any lands, tenements, and hereditaments or heritages, on the profits of the preceding year . . . .

"Parish of Wakefield.

"To Wakefield Rural District Council of Tetley House.

"Take Notice that an assessment has been duly made on you by the Commissioners for putting into execution the Income Tax Acts, for the year ending April 5, 1910, as follows:—

—	Amount of Assessment.	Duty Payable.
	£ s. d.	£ s. d.
Under Schedule D, on the annual value or profits of Waterworks (List No. 1). . . .	345 10 0	—
. . . . .		
Net amount chargeable at 1*s.* 2*d.* in the pound	—	20 3 1" (1)

11. The appellants contended (inter alia) (1.) that they were traders in water and should be treated for income tax purposes

(1) The amount of assessment as stated in the case is 347*l.* 10*s.* The difference was not explained.—NOTE BY REPORTER.

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as such, and that they should be assessed in respect of their trading in one sum after deducting losses from profits (as described in paragraph 4) as is done in the case of all other traders, and accordingly claimed to have the total assessments reduced to the sum of 104*l.* 10*s.* 1*d.* arrived at as follows :—

ORIGINAL ASSESSMENTS WITHOUT DEDUCTION OF ESTABLISHMENT CHARGES.

Alverthorpe Crigglestone Crofton Sharlston Walton Warmfield	. . . .	£585	10 0
Deduct losses		66	6 11
		519	3 1
Deduct establishment charges . .		414	13 0
		£104	10 1

12. They pointed out that the council is the person assessed, the notice of assessment being addressed to them, in respect of the profit which the council made in respect of these waterworks, and that all the property in and the management of the water supplies is vested in them, and that the water is purchased by them for all the parishes and is supplied to them under one agreement with the Wakefield Corporation.

13. The appellants further contended (2.) that as each assessment amounted to less than 160*l.* total exemption could be claimed in each case.

14. The surveyor contended (inter alia) that each parish was a contributory place and no general supply had been undertaken for the whole rural district, and that each water undertaking for each separate parish was a separate concern and was properly assessed separately.

15. He further pointed out that separate accounts were kept for the water supply in each contributory place and that the

appellants had no power to divert and as a matter of fact never had diverted the profits from any parish or levied any deficiency elsewhere than upon the parish itself where the deficiency arose; that the profits in fact and in law belonged to the ratepayers of the particular parishes in which they were earned, and that the appellants were assessable as trustees, agents, or representatives of such ratepayers.

16. The Commissioners held that the water undertakings were separate concerns, and confirmed the assessments. They also came to the conclusion that the appellants were not entitled to exemption.

Ryde, K.C., and *Compston*, for the appellants. Assuming that the Commissioners were right in finding that the water undertakings in the several parishes were separate concerns, by s. 101 of the Income Tax Act, 1842, the appellants are entitled to deduct from the profits acquired in the profitable parishes the excess of loss sustained in the unprofitable parishes over the profits realized therein. That section, it is true, in terms applies only where the profits of the concerns are chargeable under Sched. (D.) to s. 100 of the Act, while the profits of the concerns in question in this case are chargeable under Sched. (A.) to s. 60. But by s. 8 of the Revenue Act, 1866, the concerns described in No. III. of Sched. (A.) are to be charged according to the rules prescribed by Sched. (D.) so far as those rules are consistent with No. III. There is nothing inconsistent with that rule in a corporation engaged in two undertakings or concerns setting off the loss made on one of them against the profit made on the other: see *Coltness Iron Co.* v. *Black*, per Lord Blackburn. (1)

But in truth the surveyor and the Commissioners were wrong in holding that the supply of water to each parish was a separate concern. This conclusion is drawn from a mistaken view of the effect of s. 229 of the Public Health Act, 1875. By that section the expenses incurred by a rural authority in providing a supply of water in so far as the expenses are not defrayed out of water rates or rents are declared to be special expenses. The authority

(1) (1881) 6 App. Cas. 315, at p. 337.

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may supply water for the common benefit of two or more contributory places and apportion the expense of construction and maintenance between those places, and the expenses apportioned to each contributory place are to be deemed special expenses legally incurred in respect of, and are made a separate charge upon, that contributory place. These provisions are irrelevant to the question in this case. They do not affect the fundamental position that the appellants are the entity which is being taxed. They are within the words of Sched. (A.), No. III., "the corporation carrying on the concern," i.e., the "waterworks . . . . or other concern of the like nature"; the property on which the tax is charged is lands, tenements, and hereditaments including waterworks; the tax is upon the annual value, i.e., "the full amount for one year or the average amount for one year of the profits received therefrom," i.e., from the waterworks. The question therefore is what profits for the year of assessment do the appellants receive from the waterworks? To arrive at the answer to that question the losses on the unprofitable contributory places must be set off against the gains from those which are profitable. Sect. 229 of the Public Health Act, 1875, merely prescribes how these profits when received are to be dealt with, a matter which is not to be considered until after the tax has fastened upon the profits received. By Sched. (A.), No. III., the duty is charged "before paying, rendering, or distributing the produce or the value either between the different persons or members of the corporation, company, or society engaged in the concern, or to the owner of the soil or property, or to any creditor or other person whatsoever having a claim on or out of the said profits."

Sir J. Simon, *S.-G.*, and *W. Finlay*, for the respondent. The surveyor and the Commissioners came to the right conclusion. The constitution of the several contributory parishes must be taken into account by the appellants, and when taken into account it is found to colour the whole transaction whereby water is supplied to any of the parishes, or whereby the construction, maintenance, and cleansing of sewers in any of the parishes is undertaken. These two undertakings are dealt with on the same basis in s. 229 of the Public Health Act, 1875. Taking the

case of the parish of Shitlington, which was the first of these contributory places to be supplied with water, it is clear that in supplying that parish with water the appellants were "carrying on the concern" within the meaning of Sched. (A.), No. III. They supplied water and received water rents for the supply. In so far as the water rents were insufficient to defray the expense of the waterworks, those expenses were special expenses under the Public Health Act, 1875. They could be defrayed by means of a rate levied on the inhabitants of the parish. In so far as the water rents exceeded the cost, the balance was held by the appellants in trust for the parish. That was a concern carried on by the appellants. In so far as in carrying on this concern they made a profit they were taxable under Sched. (A.); in so far as they made a loss they were not taxable. The waterworks on which the tax was charged was the undertaking or concern of supplying water to the parish of Shitlington. How was this state of things altered when in the year 1889 the appellants entered upon the undertaking of supplying Alverthorpe? The two concerns or undertakings were quite separate and distinct. If a profit were made on the Shitlington concern the profit was held in trust for Shitlington; if a loss were made on the Alverthorpe concern the inhabitants of Alverthorpe were rated to make up the deficit. The profits of one parish could not be applied as a set-off against the loss in the other. If authority were wanted for this proposition it would be found in *Earl of Jersey* v. *Uxbridge District Council.* (1) The debts of a district council are not to be paid out of property held in trust for one of their contributory places. The water and the apparatus for supplying it to each parish is the property of that parish, bought with its money, and held in trust for its inhabitants. The same applies to each of the undertakings or concerns in this case. It may be that for convenience the appellants' main pipes pass through the nearer parishes and on to the more remote, and that upon the former is imposed an easement or servitude for the benefit of the latter; but that is a matter of form and not of substance. The separate concerns do not become one concern by the mere force of the means whereby they are carried on. A

(1) [1891] 3 Ch. 183.

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broker may make one contract in respect of the orders of several customers, but that does not prevent the contract of each customer with the merchant from being a separate contract. Several persons may join together and buy in one lot the parcels required by each respectively. Similarly in the present case, although the main pipes may carry water to all or several of the parishes, there is a separate supply to each parish, and a separate concern in respect of each separate supply.

If this be the true view it is clear that s. 8 of the Revenue Act, 1866, does not enable the appellants to deduct from the amount of profits in the profitable parishes the excess of loss over profits in the unprofitable parishes. That section enacts that concerns described in No. III. of Sched. (A.) shall be charged and assessed "according to the rules prescribed by Schedule (D.)." The enactment which permits the deducting from profits acquired in one concern the excess of loss over profits in another concern is not one of the rules prescribed by Sched. (D.), but is s. 101 of the Act of 1842.

Ryde, K.C., in reply, cited *London County Council* v. *Attorney-General.* (1)

HAMILTON J. This is an appeal by the Wakefield Rural District Council from a decision of the Income Tax Commissioners affirming a claim by the surveyor of taxes to assess the appellants in respect of waterworks at a sum of 347*l.* 10*s.* The appellants contend that a sum of 104*l.* 10*s.* 1*d.* and no more is the amount in respect of which they are assessable.

Under powers conferred by the Public Health Act, 1875, the appellants in the year 1880 undertook the supply of water to one of the parishes in the district, Shitlington. In 1889 they extended the supply to four other parishes; subsequently four more parishes were added, and there are now nine parishes to which the appellants supply water. Under a local Act of the borough of Wakefield they took over certain main pipes and other works and appliances necessary for that purpose. As the

(1) [1901] A. C. 26.

result of this enterprise profits are made in four of the parishes or contributory places, and the sum of those profits is 347*l.* 10*s.*, the sum at which the surveyor claims to assess the appellants. Losses, however, are incurred in other parishes which the appellants claim to set off against the profits made in the four parishes. By this set-off, and further by deducting establishment charges which are common to the whole supply, they arrive at the sum of 104*l.* 10*s.* 1*d.* as the figure at which they ought to be assessed. The water is supplied to consumers in return for a water rent; the rates payable by the ratepayers of the parish are only resorted to where the sums received from the consumers are inadequate to meet the expenses of supply. The appellants are bound to keep separate accounts for the water supply in each contributory place; they cannot take the profits made in one place and apply them to the benefit of another; they cannot levy a rate in any parish to meet a deficiency elsewhere; and where in a given year a surplus is made in a given parish, it is carried forward to meet the cost of supply to that parish in the following year. In that sense and to that extent it is true that the appellants separately supply the contributory parishes or places as separate customers. The water which they require for this supply is obtained in bulk from the borough of Wakefield and is paid for by meter and scale as arranged between the parties.

On these facts the Commissioners held, confirming the surveyor of taxes, that in respect of each contributory place the undertaking was a separate concern.

The appellants raise two points. First, they claim the benefit of s. 101 of the Act of 1842 as enabling them to set off against the profits acquired in the concerns, if they be concerns, of the four profitable parishes the excess of the loss sustained in the unprofitable parishes, and as justifying their claim to be assessed upon the smaller amount. The terms of s. 101 are clearly applicable only to cases where profits are made which are "made chargeable under the rules of Schedule (D.)," that is to say, by s. 100 of the Act. But the appellants contend that s. 101 is made applicable to them, although they are charged not under Sched. (D.) but

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under Sched. (A.), in respect of waterworks, as a corporation carrying on that concern. They contend that s. 8 of the Revenue Act, 1866, has the effect of giving them, though charged under Sched. (A.), the benefit which s. 101 of the Act of 1842 gives to those who are charged under Sched. (D.).

I accept of course the decision in *Coltness Iron Co.* v. *Black* (1) that s. 8 of the Act of 1866 was not limited to making a change in the tribunals before which the several assessments might come; the question is how much further that section goes. The appellants must establish that it operates to apply to those assessed under Sched. (A)., No. III., the benefit given in terms by s. 101 of the Act of 1842 to those only who are assessed under Sched. (D.). In my view the section cannot go that length. The words in s. 101 "concerns . . . . the profits whereof are made chargeable under the rules of Schedule (D.)" point to concerns different from those described in Sched. (A.), No. III. It is to these latter concerns that s. 8 of the Revenue Act, 1866, applies, making them chargeable and assessable in the manner mentioned in Sched. (A.), No. III., but according to the rules prescribed by Sched. (D.) so far as those rules are consistent with No. III. It is not contended that s. 101 can be called one of the rules prescribed by Sched. (D.). In my opinion the words "charged . . . . in the manner in No. III. mentioned according to the rules prescribed by Schedule (D.)" have not the same meaning or effect as "made chargeable under the rules of Schedule (D.)." The benefit of the set-off provided under s. 101 remains limited to persons carrying on "concerns the profits whereof are made chargeable under the rules of Schedule (D.)," s. 8 of the Revenue Act, 1866, notwithstanding.

The other and more substantial contention of the appellants is this. The assessment is upon waterworks in the first instance: when the Commissioners speak of the various undertakings being separate concerns no doubt they had in view that part of s. 60 of the Act of 1842 which begins "the duty in each of the last three rules is to be charged on the person, corporation, company, or society of persons, whether corporate or not corporate, carrying

(1) 6 App. Cas. 315.

on the concern." But the hereditament which these waterworks constitute has for its annual value the full amount of the profits of the year preceding, that is to say, the profits of the hereditament consisting of the waterworks. The person chargeable and liable to pay is in this case a corporation carrying on the concern. The subject of the charge is "the amount of the produce or value thereof"—i.e., the concern, in other words the waterworks—and the time for payment is "before paying, rendering, or distributing the produce or the value, either between the different persons or members of the corporation, company, or society engaged in the concern, or to the owner of the soil or property, or to any creditor or other person whatever having a claim on or out of the said profits." The appellants therefore contend that the rendering or distributing by them of the produce or the value, or the allocation or appropriation by them to profitable or unprofitable parishes, is beside the mark; that their liability to assessment is determined before all or any of those matters arise. It is said, and I think rightly, that the concern is the waterworks. The expression "carrying on the concern" in s. 60 is a compendious way of saying "carrying on quarries of stone, slate, limestone . . . . waterworks," and so on, and of describing all those different properties which are liable to charge. What then are the waterworks which are liable to charge? The waterworks are property and are charged, as a subject of property analogous to mines, ironworks, docks, &c., as one undertaking or enterprise for every purpose except dissection of the accounts with a view to paying, rendering, or distributing the produce. The Commissioners have found that the water undertakings are separate concerns, but they have done so by reason of the view they took of the obligations laid on the appellants by the Public Health Act, 1875, which are really matters connected with the appropriation of the results of their supply of water after the profits of the year have been ascertained as a whole.

The case of *Earl of Jersey* v. *Uxbridge District Council* (1) throws very little light upon this case. The facts there enabled the Court to infer that the property sought to be taken was

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property, vested no doubt in the defendants, the debtors, but subject to a trust for the separate contributory places. Its local situation as well as its actual purpose pointed to that conclusion. The case was not concerned with a duty charged upon the sewage works of the district council, but with the remedy of a judgment creditor against the council.

The Solicitor-General contended that the appellants were mere agents interposed in order to enable a group of parishes each to carry on a separate undertaking for its water supply; he urged that, it being impracticable for each parish to collect the requisite water on its own area, the Legislature, providing for their future needs, devised a means whereby the water might be collected elsewhere and pumped through the areas of the various parishes; that in substance the various parishes, pledging the credit of their several rates for their separate supplies, had united in the common enterprise of procuring through the appellants a supply of water purchased in common but consumed in severalty. The obligation to keep separate accounts and the separate liability of the rate-payers of each parish for deficiency in that parish are said to indicate separate concerns. The difficulty is to bring this view into harmony with the taxing Act. The appellants are the corporation which carries on the concern, while the separate parishes are at most persons having a claim on or out of the profits, and the mortgagees of the rates are creditors having a claim thereon. The fact is that the supply is a joint supply; the impulse by which the water is circulated is a common impulse. It is easy to separate the local systems of pipes in each contributory place from those in the other contributory places; but, when it comes to the common mains, difficulties arise which are not solved by notionally apportioning among the parishes a main which actually remains entire or by assigning to each parish so much of the main as lies within its area subject to an easement or wayleave in favour of more remote parishes. These devices only increase the difficulty, which is insuperable on a true view of the statute, of regarding these waterworks as several separate undertakings carried on as separate concerns having a mere physical continuity but a real and substantial separation. I have come to the conclusion,

therefore, that the appellants are only assessable on 104*l.* 10*s.* 1*d.* and that the appeal must be allowed.

Appeal allowed.

Solicitors for appellants: *Blundell, Gordon & Co., for H. Beaumont, Wakefield.*

Solicitor for respondent: *The Solicitor of Inland Revenue.*

NOTE.—Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 60: "The duties hereby granted and contained in the said schedule marked (A.) shall be assessed and charged under the following rules, which rules shall be deemed and construed to be a part of this Act, and to refer to the said duties, as if the same had been inserted under a special enactment.

. . . . . .

"No. III.—Rules for estimating the lands, tenements, hereditaments, or heritages hereinafter mentioned which are not to be charged according to the preceding general rule.

"The annual value of all the properties hereinafter described shall be understood to be the full amount for one year, or the average amount for one year, of the profits received therefrom within the respective times herein limited: . . . .

Third.—Of iron works, gas works, salt springs or works, alum mines or works, waterworks, streams of water, canals, inland navigations, docks drains, and levels, fishings, rights of markets and fairs, tolls, railways, and other ways, bridges, ferries, and other concerns of the like nature, from or arising out of any lands, tenements, hereditaments, or heritages, on the profits of the year preceding:

"The duty in each of the last three rules to be charged on the person, corporation, company, or society of persons, whether corporate or not corporate, carrying on the concern, or on their respective agents, treasurers, or other officers having the direction or management thereof, or being in the receipt of the profits thereof, on the amount of the produce or value thereof, and before paying, rendering, or distributing the produce or the value, either between the different persons or members of the corporation, company, or society engaged in the concern, or to the owner of the soil or property, or to any creditor or other person whatever having a claim on or out of the said profits; and all such persons, corporations, companies, and societies respectively shall allow out of such produce or value a proportionate deduction of the duty so charged, and the said charge shall be made on the said profits exclusively of any lands used or occupied in or about the concern:"

Sect. 100: "The duties hereby granted, contained in the schedule marked (D.), shall be assessed and charged under the following rules, which rules shall be deemed and construed to be a part of this Act, and to refer to the

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said last-mentioned duties, as if the same had been inserted under a special enactment.

"SCHEDULE (D.).

"The said last-mentioned duties shall extend to every description of property or profits which shall not be contained in either of the said Schedules (A.), (B.), or (C.), and to every description of employment of profit not contained in Schedule (E.), and not specially exempted from the said respective duties, and shall be charged annually on and paid by the persons, bodies politic or corporate, fraternities, fellowships, companies, or societies, whether corporate or not corporate, receiving or entitled unto the same, their executors," &c.

Sect. 101: "Provided always . . . . that nothing herein contained shall be construed to restrain any person carrying on . . . . two or more distinct trades, manufactures, adventures, or concerns in the nature of trade, the profits whereof are made chargeable under the rules of Schedule (D.), from deducting or setting against the profits acquired in one or more of the said concerns the excess of the loss sustained in any other of the said concerns over and above the profits thereof, in such manner as may be done under this Act where a loss shall be deducted from the profits of the same concern, or to restrain any of such persons from making separate statements thereof, ... and the respective Commissioners shall have authority to allow such deductions as in other cases, and to assess such person accordingly."

Revenue Act, 1866 (29 & 30 Vict. c. 36), s. 8: "The several and respective concerns described in No. III. of Schedule (A.) of the said Act passed in the fifth and sixth years of Her Majesty's reign, chapter 35, shall be charged and assessed to the duties hereby granted in the manner in the said No. III. mentioned, according to the rules prescribed by Schedule (D.) of the said Act, so far as such rules are consistent with the said No. III. . . . ."

W. H. G.

THE DUKE OF BEAUFORT *v.* THE COMMISSIONERS OF INLAND REVENUE.

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March 6.

Revenue—Mineral Rights Duty—Rental Value—Rent paid by Working Lessee in last Working Year—Arrears of Rent—Landlord's Property Tax—Super-tax—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *ss.* 20, 66.

By s. 20 of the Finance (1909-10) Act, 1910, mineral rights duty is charged on the rental value of all rights to work minerals. Where the right to work the minerals is the subject of a mining lease, the rental value is the amount of rent paid by the working lessee in the last working year in respect of that right.

The appellant was the grantor of a mining lease at a yearly rent of 500*l.* In the year ending September 30, 1909 (which was the last working year for the purposes of the case), he received from the lessees a sum of 356*l.* 5*s.*, being 375*l.* in respect of three quarters' rent in arrear for the year 1907 less 18*l.* 15*s.* deducted by the lessees in respect of income tax:—

Held, that the amount of rent paid by the working lessees included the sum of 356*l.* 5*s.*, but did not include the sum of 375*l.*, and consequently that the former and not the latter sum constituted the rental value upon which mineral rights duty was chargeable.

By s. 66 of the Act there is charged for the year therein specified in respect of the income of any individual the total of which from all sources exceeds 5000*l.* an additional duty of income tax referred to in the Act as super-tax. For the purposes of super-tax the total income of any individual from all sources is the total income of that individual from all sources for the previous year estimated in the same manner as the total income from all sources is estimated for the purposes of exemptions or abatements under the Income Tax Acts.

It being assumed that the appellant was liable to pay super-tax:—

Held, that in order to arrive at the rental value of the mineral rights aforesaid the amount of super-tax was not to be deducted from the above sum of 356*l.* 5*s.*

APPEAL under s. 33, sub-s. 4, of the Finance (1909-10) Act, 1910, from the decision of a referee stated at the request of the parties in the form of a special case, from which the following facts appeared:—

The Duke of Beaufort, the appellant, was assessed for mineral rights duty under s. 20 of the Finance (1909-10) Act, 1910 (1),

(1) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 20: "(1.) There shall be charged, levied, and paid for the financial year ending the thirty-first day of March, 1910, and every subsequent financial year on

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for the year 1909-10 upon certain mineral rights upon a rental value of 500*l.*, and duty amounting to 25*l.* was charged thereon.

The mineral rights were included in a lease dated May 25, 1908, and made between the appellant and the Copper Pit Collieries, Limited, whereby the appellant leased the veins of coal there mentioned to the colliery company for a period of

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the rental value of all rights to work minerals and of all mineral wayleaves, a duty (in this Act referred to as a mineral rights duty) at the rate in each case of one shilling for every twenty shillings of that rental value.

"(2.) The rental value shall be taken to be:—

"(*a*) Where the right to work the minerals is the subject of a mining lease, the amount of rent paid by the working lessee in the last working year in respect of that right; and

"(*b*) Where minerals are being worked by the proprietor thereof, the amount which is determined by the Commissioners to be the sum which would have been received as rent by the proprietor in the last working year if the right to work the minerals had been leased to a working lessee for a term and at a rent and on conditions customary in the district, and the minerals had been worked to the same extent and in the same manner as they have been worked by the proprietor in that year . . . .

"Provided that if in any special case it is shown to the Commissioners that the rent paid by a working lessee exceeds the rent customary in the district, and partly represents a return for expenditure on the part of any proprietor of the minerals which would ordinarily have been borne by the lessee, the Commissioners shall substitute as the rental value of the right to work the minerals or the mineral wayleaves, as the case may be, such rent as the Commissioners determine would have been the rent customary in the district if the expenditure had been borne by the lessee."

Sect. 66: "(1.) In addition to the income tax charged at the rate of one shilling and twopence under this Act, there shall be charged, levied, and paid for the year beginning on the sixth day of April, 1909, in respect of the income of any individual, the total of which from all sources exceeds 5000*l.*, an additional duty of income tax (in this Act referred to as a super-tax) at the rate of sixpence for every pound of the amount by which the total income exceeds 3000*l.*

"(2.) For the purposes of the super-tax, the total income of any individual from all sources shall be taken to be the total income of that individual from all sources for the previous year, estimated in the same manner as the total income from all sources is estimated for the purposes of exemptions or abatements under the Income Tax Acts . . . ."

forty-two years from September 29, 1906, at a fixed yearly rent (after the first quarter) of 500*l.* payable quarterly on March 25, June 24, September 29, and December 25 in each year.

On October 2, 1908, the appellant received from the colliery company a sum of 356*l.* 5*s.*, but except for that sum during the period commencing October 1, 1908, and ending September 30, 1909, he received no other payment under the lease.

The sum of 356*l.* 5*s.* represented arrears of fixed rent which had become due and payable under the lease for the three quarters of a year ending September 29, 1907. The rent reserved by the lease for those three quarters amounted to 375*l.*, but from this a sum of 18*l.* 15*s.* had been deducted by the colliery company in respect of income tax paid by them to the Crown.

It was agreed that the appellant was to be treated for the purposes of this case as if, under s. 66 of the Finance (1909-10) Act, 1910, he had been assessed in respect of super-tax at the rate of 6*d.* in the pound for the year beginning April 6, 1909, and as if the said sums of 356*l.* 5*s.* and 18*l.* 15*s.* had been taken into account for the purpose of such assessment and that the appellant had paid in respect thereof super-tax to the amount of 9*l.* 7*s.* 6*d.*

On behalf of the Commissioners it was admitted that the assessment must be reduced from 500*l.* to 375*l.* in any event.

On behalf of the appellant it was contended:—

(*a*) That the assessment was wholly void as being an assessment upon arrears of rent due and payable prior to October 1, 1908.

(*b*) That the amount deducted by the colliery company in respect of income tax ought not to be included for purposes of assessment, but that such assessment ought to be made on the amount of rent actually received by the appellant.

(*c*) That the super-tax received by the Crown from the appellant in respect of the premises should not be included in the amount on which the assessment was made, or alternatively that relief to the extent of the amount of such super-tax should be given to the appellant.

On behalf of the Commissioners it was submitted that all the above contentions were erroneous.

The referee decided that the above contentions were erroneous,

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and awarded that the assessment was to stand at the amount agreed to by the Commissioners, namely, 375*l*. If in the opinion of the Court the said arrears of fixed rent ought not to have been included for purposes of assessment, then the award was to be quashed.

If in the opinion of the Court the said arrears were properly brought into assessment but the amount of income tax deducted by the colliery company ought not to have been included, then the award should be varied by providing that the rental value be reduced to 356*l*. 5*s*. and the mineral rights duty to 17*l*. 16*s*. 3*d*.

If in the opinion of the Court the said arrears were properly brought into assessment but the amount of super-tax above mentioned ought not to have been included, or if under the Act there was power for the Commissioners to give relief in the premises, then the award was to be varied by providing that the rental value mentioned in the assessment be reduced to 346*l*. 17*s*. 6*d*. and the mineral rights duty to 17*l*. 6*s*. 10½*d*.

Danckwerts, K.C., and *Micklethwait*, for the appellant. The financial year ending March 31, 1910, was the first financial year. Mineral rights duty became payable for that year on the rental value of the right to work minerals; that is to say, on the amount of rent paid by the working lessee in the last working year in respect of that right. By s. 24 of the Act the expression "working year" means the year ending September 30, and the expression "last working year" means the working year completed immediately before January 1 in any financial year for which the duty is paid. The financial year for which the duty is paid in this case is the year ending March 31, 1910; the last working year, therefore, is the year ending September 30, 1909. October 2, 1908, fell within that year. On that day three quarters' arrears of rent for the year 1907 were paid. The Crown claim mineral rights duty on that rent because it was de facto paid on October 2, 1908, although it was due and payable on or before September 29, 1907. This Act does not purport to charge any rental value before October 1, 1908. The contention of the Crown gives the Act in the circumstances of this case a

retrospective operation which it was never intended to have. If the rent had been ten years in arrear equally according to that contention the appellant would be taxed on a ten years' rental value. The rental value in any year ought not to depend on whether the rent is in arrear or not. The rental value is the amount of rent paid in the last working year in respect of the right to work minerals and paid by a working lessee who pays his rent regularly and punctually. This is borne out by the proviso to s. 20 which in certain cases makes the rent customary in the district the true measure of the rental value.

Secondly, assuming that the arrears were "rent paid by the working lessee in the last working year" within the meaning of s. 20, sub-s. 2 (*a*), how much has been paid? Not the whole 375*l.*, but only that amount less 18*l.* 15*s.* deducted by the lessees in respect of income tax. It is the merest fiction to say that this sum of 18*l.* 15*s.* is "rent paid by the working lessee." It is the Crown's share of the profits: *Ashton Gas Co.* v. *Attorney-General* (1), affirming *Attorney-General* v. *Ashton Gas Co.* (2) The right to make and the consequences of making this deduction are declared and pronounced by s. 60, Sched. (A.), No. IV., r. 9, of the Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 40 of the Income Tax Act, 1853 (16 & 17 Vict. c. 34), and s. 15 of the Revenue (No. 1) Act, 1864 (27 & 28 Vict. c. 18). By those enactments every person liable to the payment of any rent is entitled and authorized, on making such payment, to deduct and retain thereout the amount of the rate of income tax chargeable by law upon the rent during the period through which the same was accruing due. The tenant paying the assessment is acquitted and discharged of so much money "as if the same had actually been paid unto the person to or for whom his rent shall have been due and payable": see the Act of 1842, s. 60, Sched. (A.), No. IV., r. 9. Therefore even as between landlord and lessee the amount deducted by the latter is not "actually paid"; a fortiori, as between the landlord and the Crown. It cannot be the intention of the Finance Act to tax a mineral owner not only on the amount of rent paid to him but on that paid to the Crown also. Therefore, putting the rights of the Crown at their highest,

(1) [1906] A. C. 10. (2) [1904] 2 Ch. 621.

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mineral rights duty can only be assessed on the amount of 356*l.* 5*s.*

Thirdly, from this sum of 356*l.* 5*s.* must be deducted 9*l.* 7*s.* 6*d.*, the amount taken to have been paid for super-tax. Super-tax is a duty of income tax: *Bowles* v. *Attorney-General.* (1) It is imposed by s. 66 of the Finance (1909-10) Act, 1910, on the income of any individual the total of which from all sources exceeds 5,000*l.* The total income is estimated as the total income from all sources is estimated for the purpose of exemptions and abatements under the Income Tax Acts, that is to say, as provided by s. 163 of the Income Tax Act, 1843. The super-tax is the Crown's share of the income of the individual. In so far as that income consists of a mineral rent the super-tax upon it is the Crown's share of the rent which is therefore not paid by the working lessee to the mineral owner. In short, the 9*l.* 7*s.* 6*d.* in respect of super-tax follows the same principle as the 18*l.* 15*s.* for landlord's property tax.

Sir John Simon, S.-G., and *W. Finlay*, for the Crown. Upon the main point the question is what is meant by the expression "the amount of rent paid by the working lessee in the last working year." By s. 2 (ix.) of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), "rent" includes yearly or other rent, toll, duty, royalty, or other reservation, by the acre, the ton, or otherwise. By s. 41 of the Finance (1909-10) Act, 1910, the expression "rent" has the same meaning as in the Conveyancing and Law of Property Act, 1881; and by s. 24 of the Act of 1910 for the purpose of the provisions of the Act as to minerals the expression "rent" includes yearly or other rent, and shall, in addition to the meaning assigned to it for the general purposes of Part I. of the Act,—i.e., s. 1 to s. 42 inclusive,—be construed as including any fine, premium, or foregift, and any payment, consideration, or benefit in the nature of a fine, premium, or foregift. That definition is wide enough to include arrears of rent. If so, the 375*l.* is rent. Was it paid in the last working year in respect of the right to work the minerals? Certainly it was. If so, this 375*l.*, or some part thereof, must be taken as the rental value. The appellant

(1) [1912] 1 Ch. 123.

contend that the rental value should be the amount of rent payable by the working lessee in the last working year. The answer to that contention is that the Act uses the word "paid" and not the word "payable." The proviso to s. 20 really throws no light on the matter. If "rent" does not only mean rent paid as it falls due, but also includes arrears of rent, that proviso is equally applicable when the arrears are paid. If the appellant's contention were sound, payment of mineral rights duty could easily be evaded. The lessor need only allow the lessee to be in arrear with his rent; then the rent for a given year would not be the rental value for that year because it was not in fact paid in that year; neither would it be the rental value for the succeeding year because it was not payable in respect of that year's working; and so it would never be payable at all.

Secondly, the sum of 18*l.* 15*s.* is not to be deducted. The whole 375*l.* is the amount "paid by the working lessee." If he were sued for that sum he could plead payment. Sect. 20 does not make the amount actually received in hard cash the basis of rental value; if it did the duty might be evaded by a set-off. The amount paid must mean the amount of which the lessee could in the circumstances of any particular case plead payment, whether in cash, or by set-off, or by payment of landlord's property tax. When the lessee pays the tax he pays part of his rent: *Denby* v. *Moore* (1), per Abbott J. and Holroyd J.; *Cumming* v. *Bedborough*. (2) In substance and in truth the lessee fills two capacities, one that of debtor to the lessor, and the other collector of income tax for the Crown. As debtor to the lessor he pays his rent; then the rent is paid. As collector of income tax he retakes for the Crown so much as is due; but still the rent has been paid. "The amount of rent paid" is a descriptive expression of the basis of taxation; it is only a means of arriving at the actual figure payable in respect of the mineral rights duty; the word "paid" is not of the essence of the phrase. To treat that word as the essential word is to give it an undue weight.

Thirdly, as to the super-tax, no doubt by s. 66 of the Act of 1910 the sum, in this case, of 375*l.* or 356*l.* 10*s.* as the case may be, must be taken into account in and before computing that

(1) (1817) 1 B. & Ald. 123. (2) (1846) 15 M. & W. 438.

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tax. The total income from all sources is the basis of super-tax. Any return of the total income of the appellant must necessarily include this 375*l.* or 356*l.* 5*s.*; but that is all that can be said in favour of the appellant's contention that the amount of super-tax is to be deducted from the 375*l.* before arriving at the rental value. The argument does not support the conclusion. The taxes in Part I. of the Act are charged and assessed without any reference whatever to those in Part IV., which includes s. 66. The rental value of the right to work minerals remains the same whether the mineral owner does or does not pay super-tax; it follows that his liability to pay mineral rights duty is independent of his liability to pay super-tax.

Danckwerts, *K.C.*, in reply.

HAMILTON J. Mineral rights duty is charged under s. 20, sub-s. 1, of the Finance (1909-10) Act, 1910, on the rental value of all rights to work minerals and of all mineral wayleaves, and by sub-s. 2 the rental value is to be taken to be, where the right to work minerals is the subject of a mining lease, the amount of rent paid by the working lessee in the last working year in respect of that right.

The appellant is the grantor of a lease of a right to work minerals which reserves to him a rent in the following terms:— "The lessees shall pay unto the Duke the following clear fixed rents, namely, in respect of the first quarter of a year of the term hereby granted the rent of one peppercorn if demanded and in respect of each and every subsequent year of the term hereby granted the yearly rent of 500*l.* such yearly rent being payable quarterly on the 25th day of March the 24th day of June the 29th day of September and the 25th day of December in every year during the said term." The habendum is "to hold from the 29th of September for the term of forty-two years."

For the purpose of calculating the rental value reference has to be made to "the last working year," and it is sufficient to say that October 2, 1908, fell within the period thus denoted. On that day the appellant received from the lessees 356*l.* 5*s.* The rent payable on March 25, June 24, and September 29 of the

year 1907 had been allowed to fall into arrear until October, 1908. When those arrears came to be paid on October 2, 1908, a sum of 18*l.* 15*s.*, paid by the lessees as income tax upon the property in question, was deducted by them with the acquiescence of the appellant. Thus the sum paid was 356*l.* 5*s.*

The first question is whether the sum of 375*l.*, or the less sum of 356*l.* 5*s.*, or whether any sum at all, is to be brought into account for the purpose of ascertaining the rental value of the right to work the minerals. I am also asked to decide whether the amount of super-tax, treated for the purposes of this case as chargeable upon the appellant, ought to have been included or not. Taken alone the words of sub-s. 2 (*a*) are "the amount of rent paid by the working lessee in the last working year in respect of that right." Counsel for the appellant contended that the phrase "in the last working year" should be taken not simply as indicating a period of time but as also connoting the obligations then due to be performed and as meaning therefore the time in respect of which the rent ought to have been paid; in other words, that the phrase "in the last working year in respect of that right" should be understood as meaning "in respect of the last working year and of that right." I see no reason for supposing that the Legislature meant anything but what it said. When it said "in the last working year" it meant "in" and not "in respect of" the last working year.

The next point arises upon the words "in respect of that right." Grammatically "that right" is the right to work the minerals without reference to any particular year, so that the rental value means in this case the rent reserved in the lease as the consideration for the right to work the minerals.

Then there are the words "paid by the working lessee." If the word "paid" could be read as "payable," it may be that the amount of rent which the lessee ought to pay, as distinguished from the amount which he actually pays, would be the measure of the rental value. But the word is "paid" and it is correlative to the word "received" in sub-s. 2 (*b*). "Paid" in sub-s. 2 (*a*) relates to an actual payment, just as "received" in sub-s. 2 (*b*) presupposes an actual receipt as the measure of the rental value. Therefore I take the word "paid" as meaning literally and

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actually paid. It is true that the proviso speaks of rent paid by a working lessee exceeding the rent customary in the district, and partly representing a return for expenditure on the part of the proprietor of the minerals; but that does not carry the matter any further because, as between that portion of a rent which is equivalent to and that portion which exceeds the customary rent and is attributable to a return for expenditure on the part of the mineral owner, the distinction is equally feasible at the time when the rent ought to be paid and at the time when it is actually paid. The words of the section are too clear to justify me in holding that the sum which was actually paid by the working lessee on October 2, 1908, is not to be part of "the amount of rent paid by the working lessee in the last working year in respect of that right" within the meaning of the section. Besides if payment of something and payment in the last working year must both concur before the duty attaches, the revenue would on the appellant's construction lose much of the benefit of this tax in cases where the rent was constantly in arrear. The sum of 356*l.* 5*s.* is at any rate an item in the calculation of the rental value on which the tax is to be charged in the succeeding fiscal year.

Then as to the sum of 18*l.* 15*s.* It was not by the terms of the lease that the tenant was bound to pay this property tax. The obligation to pay it is imposed by the Income Tax Acts, which, while they oblige the tenant to pay, provide a means by which he may recoup himself or pass on the burden to his landlord. The specific provision in this case is r. 9 of No. IV. of Sched. (A.) to s. 60 of the Income Tax Act, 1842. The words are "The tenant paying the said assessment shall be acquitted and discharged of so much money as if the same had actually been paid unto the person to or for whom his rent shall have been due and payable." His obligations in regard to being charged with the duty are, under No. III. in the same schedule, obligations "on the amount of the produce or value thereof, and before paying, rendering, or distributing the produce or the value . . . . to the owner of the soil or property or to any creditor or other person whatever having a claim on or out of the said profits." The words "as if the same had actually been paid" point to the fact that the occupier does

not pay the landlord; he pays the sum over to the collectors of Inland Revenue because by law he must do so. The law gives him an acquittance and discharge as if he had paid the person to whom his rent was due and payable; but the underlying assumption is that he has not. The words "rent paid" in s. 20, sub-s. 2 (*a*), ought to be construed strictly and limited to the amount which actually reaches the landlord. It is true that as between landlord and tenant rent may be paid by means of a set-off or other discharge as well as by actual payment in cash. But that is not this case. Here, there being no request to pay, there is nothing to set off. There is merely a statutory right to deduct. It cannot be said that the whole 375*l.* has been paid when in fact only 356*l.* 5*s.* has been paid. To that extent therefore the appeal succeeds, and instead of 375*l.* only 356*l.* 5*s.* should have been brought into account.

One point remains to be considered. In the year 1908 no super-tax was chargeable under the revenue legislation, but the parties have agreed to treat this question as if the tax had then been chargeable. The question is whether, assuming that the appellant is a person liable to pay super-tax, some allowance ought to be made out of the sum of 356*l.* 5*s.* by reason of that tax. The last paragraph of the special case dispenses with inquiry as to the amount and mode of calculation, and I have only to decide whether the claim to an allowance is well founded. The appellant contends that mineral rights duty is a charge upon a person in respect of rent or royalties of which he is he proprietor; that the Crown in collecting the tax from the lessee intervenes between the lessee and the mineral owner and takes what is called its share of the profit of working the minerals, leaving the balance only to be paid to the mineral owner; that the Legislature cannot have intended that the mineral owner should be liable to pay tax upon that portion of the profits which has never come to him and of which he never was the proprietor, but which was from the beginning the property of the Crown. He is content to be taxed upon his total income from all sources, but not upon an amount which represents the Crown's share of the proceeds of the enterprise which in fact the revenue has already received. I cannot accept this argument. Mineral rights duty is not a duty of

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Hamilton J.

income tax. It is one of a separate group or class of duties charged upon various interests in or advantages derived from real estate and not necessarily dependent upon profits. It is charged on the rental value of the right to work minerals; the method of ascertaining the rental value is rigidly prescribed by sub-s. 2 (*a*), and excludes allowance or abatement in view of any overlapping provisions of other taxing enactments. From the character of the duty itself it seems clear that no diminution is allowable of the sum actually paid by the working lessee in the last working year. Upon the main question the appeal fails, but it succeeds upon the minor point. The assessment must be reduced to 356*l.* 5*s.* and the mineral rights duty to 17*l.* 16*s.* 3*d.*

Assessment amended.

Solicitors for appellant: *Williams & James.*
Solicitor for the Crown: *The Solicitor of Inland Revenue.*

W. H. G.

C. A.

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March 15.

[IN THE COURT OF APPEAL.]

HIGGINS *v.* POULSON.

Employer and Workman—Injury by Accident—Compensation—Weekly Payment—Temporary Total Incapacity—Subsequent Partial Incapacity—Form of Award—Workmen's Compensation Rules, 1907, *Appendix, Form* 24—*Intra vires—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I.* (16.).

In all ordinary cases under the Workmen's Compensation Act, 1906, where a workman has sustained an injury by accident arising out of and in the course of his employment, resulting in his total incapacity for the time being, and entitling him to a weekly payment by way of compensation, the arbitrator ought to make his award in accordance with Form 24 in the Appendix to the Workmen's Compensation Rules, 1907, ordering the weekly payments to continue during the total or partial incapacity of the claimant for work, or until the payments shall be ended, diminished, increased, or redeemed in accordance with the Act.

Form 24 is intra vires and entirely consistent with the policy of the Act.

APPEAL from an award of the judge of the Lancaster County Court, sitting at Liverpool, as arbitrator upon an arbitration under the Workmen's Compensation Act, 1906.

The applicant was injured by an accident arising out of and in the course of his employment by the respondents, and was at the time thereby totally incapacitated for work. The respondents admitted their liability and were willing to submit to an award of 10*s.* per week during total incapacity, the amount of any payment in respect of subsequent partial incapacity to be settled thereafter. The applicant was willing to accept the sum of 10*s.* a week, but contended that the award should be made in the ordinary form as given in Form 24 in the Appendix to the Workmen's Compensation Rules, 1907. The county court judge made his award in accordance with Form 24, ordering the weekly payment "to continue during the total or partial incapacity" of the workman "for work, or until the same shall be ended, diminished, increased or redeemed, in accordance with the provisions of the above-mentioned Act."

From this award the employers appealed.

Segar, for the appellants. The county court judge was wrong in making the award in terms which embraced the period of partial incapacity. The award in that form is ultra vires: Sched. I. 1 (*b*). It is an inadmissible form of award. There is clearly a discretion in the county court judge to make an award in the form suggested by the appellants.

F. E. Bodel, for the respondent, was not called upon.

COZENS-HARDY M.R. This is an important appeal if there were any foundation for it, but having regard to the scheme of the Act I feel no doubt that Form 24 is consistent with the policy of the Act, and in ordinary circumstances is the most consistent, if not the only consistent, form. Observe what the scheme of the Act is. The workman has to make out, in the first instance, that there has been an accident arising out of and in the course of his employment, and the arbitrator, the county court judge in most cases, has to decide what within the limits of the Act is the amount of compensation, the weekly payment, the workman is entitled to, and he makes the order accordingly. But the Act contemplates, what is sufficiently obvious, that an award, which was quite right at the time when it was made, may,

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by reason of change of circumstances, become improper. This Court has held more than once that under the review section, par. 16 of Sched. I. of the Act of 1906, there must be a change of circumstances in order to bring the right to review into play. Who is the person who is to review? Paragraph 16 seems to me to be express: "Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum above provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act." That says quite plainly that, although there is a right to review, it is a right to review at the request of one party or the other. If the employer desires to review, the onus is upon him to satisfy the Court that there has been a change of circumstances which entitles him to obtain the review which he asks for. If, as not infrequently happens, the workman says there is a change of circumstances, and that which was formerly mere speculation into the future, and, therefore, could not be acted upon, has now been proved by experiment, by the test of actual facts, to be correct, he can apply to review and have the compensation increased within the limits of the Act. But I cannot read par. 16 of Sched. I. in any other way than as implying, nay, asserting, that the compensation which has been awarded can only be reviewed and altered by a person who takes upon himself the onus of establishing a change of circumstances, and, consequently, the right to review. Another provision of the Act, it seems to me, affords an argument almost as irresistible—I refer to the provision that an award may be enforced as a county court judgment. How can it possibly be so enforced if we lend any assent to the argument which we have heard, namely, that the award ought only to be, say, 10*s.* a week during the total incapacity and to cease ipso facto unless it can be established that the total incapacity continues; or, in other words, that the right to levy an execution can be determined at once by a refusal of the employer to make the payment, necessitating an application by the workman to have the amount ascertained. Form 24, which has been adopted, certainly in 999 out of every 1000 cases that have come before us, seems to be entirely in accordance with the spirit and sense of the Act.

It is an award of "compensation for personal injury caused to the said on the day of by accident arising out of and in the course of his employment as a workman employed by the said respondents, such weekly payment to commence as from the day of , and to continue during the total or partial incapacity of the said for work, or until the same shall be ended, diminished, increased, or redeemed in accordance with the provisions of the above-mentioned Act." That is in accordance with Sched. I., par. 16, of the Act of 1906. I feel no doubt whatever that Form 24 is intra vires. I have equally little doubt that under ordinary circumstances the county court judge would be wise in doing that which most of the county court judges have done, namely, in adopting that form. I do not go as far as to say that no other form might be used. I can conceive circumstances which would render modification desirable. But as this form is intra vires this appeal is hopeless, because it was competent to the learned judge to make the award in the form in which he has made it. I have thought it right to say that much because of the importance of the case, but I should have been content to let the case stand upon the very careful, admirable, and correct judgment of his Honour Judge Thomas, who, I think, has taken every point which I have endeavoured to take in language to which I have not really attempted to add anything.

In my opinion this appeal fails and must be dismissed with costs.

FLETCHER MOULTON L.J. I agree entirely with the judgment of the Master of the Rolls, and also with the very able and thoughtful judgment of his Honour Judge Thomas which has been before us. I will only add a very few words in order to make it quite clear that the decision in this case turns on no special circumstances, but upon the general policy and provisions of the Act. In this case the original incapacity was so evident that the employers expressed their willingness to pay the amount that has been awarded during total incapacity, leaving the amount to be paid when total incapacity had ceased, and probably had been succeeded by partial incapacity, to be settled when the occasion had arrived. The workman refused to accept this and

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Fletcher Moulton L.J.

appealed to us against its being forced upon him. We decided that his refusal created a question which was to be decided between the parties, and we sent it back to the learned judge of the county court. (1) The parties then came before him, not on the question as to what was the proper amount of compensation to be paid rebus sic stantibus, but upon the form of the award; and the learned county court judge expressly says that this is an ordinary case, and he has decided what in an ordinary case should be the form of the award. He has taken the form that is given in the Appendix to the Rules, and the one which, I agree with the Master of the Rolls, has been acted upon in 999 out of 1000 of the cases that have come before us, some of which have gone to the House of Lords. It would require a strong case to make me believe that every one of those awards was ultra vires, for it must be remembered that this appeal fails unless the appellants can shew that it was ultra vires on the part of the county court judge to use the statutory form. If, as in the argument below they suggested, there was a discretion, they clearly could not come to us. I do not, however, wish to leave it in that way, because I should not like to give countenance to the idea that there was a question whether the judge has a discretion to choose between such an award as the appellants would urge upon us and the statutory form. In my opinion the statutory form carries out the intention of the Act, namely, that the award should be an award of weekly payments to be made while the incapacity lasts. They are not to be made only while the incapacity remains in exactly the same state as it is at the moment when the award is made, but to be made while the incapacity lasts, subject to one thing, and that is the power to review. The policy of the Act is that the award should be a clean award of weekly payments subject to the power of review for the purpose of increasing, diminishing, or terminating those weekly payments. It is only because that is the intention of the Act with regard to the purport of the award that it was possible to provide by the Act that the award should be enforced as a county court judgment. Unless the award was a direct order to pay a sum until legal proceedings had been taken to change it, it would have been

(1) (1912) 5 B. W. C. C. 66.

impossible to make such a provision work. For these reasons I am of opinion that the statutory form ought to be followed in all ordinary cases; and I do not put it more strongly than that, simply because I do not think it is safe to trust to one's imagination as to what extraordinary cases might arise; but in ordinary cases I have no doubt it is the duty of the county court judge to adopt that form.

BUCKLEY L.J. The employers here say "We admit that the workman is totally incapacitated by an accident entitling him to compensation under the Act, and we admit that the sum which he claims, 10*s.* a week, is the right sum. Under those circumstances the order to be made is an order for 10*s.* a week during total incapacity." To that the workman replies "No; that is not the order to which I am entitled, but an order in the form of Form 24 during total or partial incapacity." If the order were made in the form which the employers suggest the result would be that if the workman attempted to enforce it by execution it might be an answer for the employers to say "The order is not operative; your incapacity is no longer total; it has become partial." Further the workman says, "If the order takes that form it will be thrown upon me from time to time to come and establish affirmatively the fact that my incapacity, if it has become partial, entitles me to some other sum." Upon a reading of the Act of Parliament, he says, and I think rightly, that that was not intended to be the result. Paragraph 16 of Sched. I. is one which it is impossible to read without seeing that it contemplates that the order which is made may be reviewed, and is one which from time to time under altered circumstances may become wrong, and is to be reviewed because it has become wrong. The order contemplated, therefore, is not one which during its currency is to be always right, but is one which from time to time may become wrong. If the order took the form the employers suggest it would not be open to that criticism. It would be always right. The contention urged before us by the appellants comes to this, that clause 1 (*b*) of the First Schedule is to be read as if it were "Where total or partial incapacity for work results from the injury a weekly

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payment during the total incapacity, if it be total, or during the partial incapacity, if it be partial, not exceeding" so and so. Now, suppose those were the words, partial incapacity is a thing which may fluctuate from time to time. So that, supposing the original application were one on which partial incapacity was proved, the order would have to be for payment during partial incapacity, and then it would be said you must say "during such partial incapacity as now exists" to the exclusion of reduced partial incapacity. From what I have said already it is obvious the Act does not contemplate an order of that description; it contemplates an order which is to be reviewed from time to time because it is said to have become wrong.

The whole contest between the parties here is whether the order should be put in such form as that it is thrown upon the workman from time to time to come back and establish that under the altered circumstances he is entitled to a sum, or in such form as that it shall stand until some one comes, either the employer or the workman, and says "the circumstances have so altered that the sum originally fixed should be varied." I think upon reading the Act of Parliament it is the latter order which is contemplated. I think, therefore, that an order in the form of Form 24 is such an order as the Act contemplated, and it is the proper form of order to be adopted. I will not say under all circumstances. There may be circumstances in which some other form might turn out to be right; but the fact that the order ought to be made in such a form as to cover a period extending beyond the particular state of circumstances under which it was originally made is, I think, indicated by the provisions of the statute itself. Here the learned county court judge has made the order in that form. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Weightman, Pedder & Co., Liverpool; Ridsdale & Son, for F. Murphy & Son, Liverpool.*

G. A. S.

[IN THE COURT OF APPEAL.]

C. A.

1912

March 20.

SCHWARTZ *v.* THE INDIA RUBBER, GUTTA PERCHA AND TELEGRAPH WORKS COMPANY, LIMITED.

Employer and Workman—Compensation—Death on High Seas—British Ship—Territorial Limits of United Kingdom—Jurisdiction—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 7. (1)

A workman employed by the defendants was directed to proceed at their expense, in a British ship, to Teneriffe to do work upon electric cables there. The ship foundered in the Bay of Biscay and the workman and all on board were lost. His dependants applied for compensation.

Held, that the Workmen's Compensation Act, 1906, had no application to British ships on the high seas except in the case of seamen and apprentices within s. 7.

Tomalin v. *S. Pearson & Son, Ld.* [1909] 2 K. B. 61, followed.

Appeal from an award of the judge of the Woolwich County Court sitting as an arbitrator under the Workmen's Compensation Act, 1906.

Schwartz was an electrician in the employment of the India Rubber, Gutta Percha and Telegraph Works Company. In December, 1910, he was engaged by them to proceed by the steamship *Axim*, a British ship, to Teneriffe to do work upon electric cables there. His fare was paid by the company, who were not the owners of the ship, and they also paid him a sea-going wage of 8*l.* a month. The ship sailed on December 9 and was never heard of again, and the Board of Trade inquiry found that there was strong presumptive evidence that she foundered in a heavy gale which prevailed in the Bay of Biscay from December 13 to 15. The wife and daughter of Schwartz applied as dependants for compensation for his death. The company denied liability on the ground that the death of

(1) Sect. 7: "(1.) This Act shall apply to masters, seamen, and apprentices to the sea service and apprentices in the sea-fishing service, provided that such persons are workmen within the meaning of this Act, and are members of the crew of any ship registered in the United Kingdom, or of any other British ship or vessel of which the owner, or (if there is more than one owner) the managing owner, or manager resides or has his principal place of business in the United Kingdom, subject to the following modifications . . . ."

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Schwartz was not caused by accident arising out of and in the course of his employment; that inasmuch as the occurrence causing his death took place outside the territorial limits of the United Kingdom the Act did not apply; and that he was not a workman to whom the Act applied. The learned judge held that the case was covered by the decision in *Tomalin* v. *S. Pearson & Son, Ld.* (1), that the Act of 1906 had no application outside the territorial limits of the United Kingdom except in the cases of seamen and apprentices as provided by s. 7, and that Schwartz did not come within s. 7. He was of opinion that the accident arose out of and in the course of the employment, but he refused the application.

The widow and daughter appealed on the grounds that (1.) the judge was wrong in law in holding that the Act did not apply to the employment of the deceased because the accident took place outside the United Kingdom; (2.) that he was wrong in law in holding that the territorial limits of the United Kingdom did not include a British ship on the high seas.

Douglas Knocker, for the appellants. The learned judge was mistaken in holding that this case was covered by *Tomalin* v. *S. Pearson & Son, Ld.* (1), for in that case the accident happened in Malta, in a country governed by its own laws, whereas the workman in the present case was drowned in a British ship on the high seas. The laws of a nation apply to its subjects in their ships on the high seas: Maxwell on the Interpretation of Statutes, 4th ed., p. 211; *Davidsson* v. *Hill.* (2) A ship which bears a nation's flag should be treated as part of the territory of that nation: *The Queen* v. *Anderson.* (3) Sect. 7 of the Workmen's Compensation Act, 1906, does not exclude from the benefit of the Act persons who are not seamen.

[BUCKLEY L.J. If s. 7 was necessary to make the Act apply to seamen it shews that the Act does not apply to persons at sea who are not seamen.]

A British ship is British territory and under British law. The laws of contract and of the sale of goods are in force on British

(1) [1909] 2 K. B. 61. (2) [1901] 2 K. B. 606.
(3) (1868) L. R. 1 C. C. R. 161.

ships on the high seas. Sect. 7 is an extending section and ought not to be used to exclude anybody from the protection of the Act; it is a short code applicable to and for the benefit of seamen and does not affect other persons; it applies not to the crew but to the ship.

Duckworth, for the respondents, was not called upon to argue.

COZENS-HARDY M.R. I am unable to assent to the argument in support of this appeal. The deceased man was employed by the respondents as an electrical engineer and was sent out by them in a British steamship to Teneriffe, his payment being so much a month at sea, and so much per week when engaged on the work. That ship was lost with all hands in the Bay of Biscay in a gale, and the widow says that she has a claim as a dependant to compensation under the Workmen's Compensation Act, 1906. For the present purposes the accident is admitted, and it may be assumed also that it arose out of and in the course of the employment. Then the appellants are met with the difficulty that the case does not fall within the express provisions of the Act, the accident having happened in the Bay of Biscay. I think this case has really been decided by *Tomalin* v. *S. Pearson & Son, Ld.* (1), and the learned county court judge took the same view. In order to see whether an accident which happened on board a British ship is within the operation of the Act we must look at the whole Act. I look at s. 7 and I see an express provision not for everybody who is on board a British ship, not for every person happening to be a sailor who is going on a British ship, but only for masters, seamen, and apprentices—speaking generally, for the crew of the ship. The language is, "This Act shall apply to masters, seamen, and apprentices to the sea service and apprentices in the sea-fishing service, provided that such persons are workmen within the meaning of this Act, and are members of the crew of any ship registered in the United Kingdom, or of any other British ship or vessel of which the owner, or (if there is more than one owner) the managing owner, or manager resides or has his principal place of business in the United Kingdom." Is it possible to hold,

(1) [1909] 2 K. B. 61.

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when we find a section dealing with a certain class, and a certain class only, of people on board a British ship, and conferring upon that particular class rights not identical with, but modified from, those conferred upon other workmen in the United Kingdom, that every man who is drowned or injured on board ship, though not himself a member of the crew, is entitled to claim compensation under the Act? In my opinion it is not. I think this was decided in *Tomalin* v. *S. Pearson & Son, Ld.* (1)

The view taken by the county court judge was in my opinion right, and although a British ship may for many purposes be British territory, and for many purposes British legislation would apply to what is done on a British ship, yet, having regard to s. 7, I can come to no other conclusion than that the Act did not extend to the ship and that we must dismiss the appeal.

FLETCHER MOULTON L.J. I agree.

BUCKLEY L.J. Where a British statute extends to the territorial limits of the United Kingdom I assume it to be true, and I have no doubt it is true, that prima facie a British ship is within the territorial limits for the purpose of the statute. I will, therefore, start with reading the Workmen's Compensation Act as extending prima facie to a British ship. But the question is one of construction. The Act may or may not extend to a British ship according to the expressions contained in it. Sect. 7 seems to me to shew that the Act does not extend to a British ship; for, if it did, s. 7 would not be necessary. If it does so extend, every seaman such as is mentioned in s. 7 would, without s. 7, have been entitled to the benefit of the Act. Sect. 7 is one which has expressly given him that benefit if he be upon a British ship. It seems to me upon the true construction of the Act that having regard to s. 7 a British ship is not for the purposes of this Act within the territorial limits of the United Kingdom to which this Act applies. It follows that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Herbert E. Thomas; William Hurd & Son.*

(1) [1909] 2 K. B. 61.

H. C. R.

[IN THE COURT OF APPEAL.]

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1911

Oct. 18.

HOMER *v.* GOUGH.

Employer and Workman—Compensation—Limited Company—Winding-up—Liquidator—Sum for which Weekly Payment redeemable—Preferential Payment—Order for Payment—Appeal—Jurisdiction—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 5.

A workman alleged to have been employed by a company applied under the Workmen's Compensation Act, 1906, s. 5, for arbitration on the question whether the receiver appointed on behalf of debenture-holders of the company and the liquidator under its voluntary liquidation were liable to pay him as a preferential payment the sum for which a weekly payment of 16*s.* 3*d.* awarded to him before the winding-up could be redeemed, and as to the amount of such payment. The county court judge made an order for the payment by the receiver and liquidator of a lump sum to the workman:—

Held, that any question whether this sum was to be paid as a preferential payment was not the subject of an appeal under the Workmen's Compensation Act, but must be decided in the winding-up.

Quære, per Cozens-Hardy M.R. and Farwell L.J., whether the county court judge had jurisdiction under s. 5 to make the order for payment of the amount.

This was an appeal from the deputy county court judge of Dudley sitting as an arbitrator under the Workmen's Compensation Act, 1906.

On April 29, 1909, Homer, a workman in the employment of Robinson, a colliery owner trading under the name of the Baptist End Colliery Company, met with an accident which made him totally incapable of work. Robinson admitted liability to pay compensation under the Workmen's Compensation Act and paid 16*s.* 3*d.* a week until December 27, 1909, when he sold his colliery business to the Baptist End Colliery Company, Limited, and the company undertook to indemnify him against all liabilities of the business. The company continued the payment to Homer until June 7, 1910, when they ceased payment on the ground that Homer had become able to do light work and had refused it when offered. On July 19 Homer made a fresh application to the county court judge against the company for compensation. On August 11, 1910, the company submitted to an award of 16*s.* 3*d.*

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a week as from June 7, 1910, and on August 16, 1910, the deputy county court judge formally awarded that sum. Meanwhile, on July 26, 1910, Wright was appointed a receiver of the assets of the company on behalf of the debenture-holders, under a power contained in their deed, and went into possession. On August 20, 1910, the company went into voluntary liquidation, and R. H. Johnston was appointed liquidator; on September 30, 1910, the defendant Gough was appointed receiver in the place of Wright.

On March 13, 1911, Homer made an application for an arbitration between himself and Gough as receiver and Johnston as liquidator of the company, stating that questions had arisen as to the liability of the said Gough, as receiver, or Johnston, as liquidator, of the Baptist End Colliery Company to pay as a preferential payment to the said Homer such a sum as is provided by s. 5, sub-s. 3, of the Workmen's Compensation Act, 1906, and ss. 16 and 17 of the First Schedule to the said Act, and as to the amount of such payment and the basis upon which the same should be calculated. Both Gough, the receiver, and Johnston, the liquidator, put in denials of their liability to pay any sums as preferential payments under s. 5, sub-s. 3, of the Act.

Before the hearing in the county court the parties had agreed that if there was any liability under s. 5, sub-s. 3, it must amount to 100*l.*, the maximum limited by the section, and the amount was not discussed at all in that Court. The matter came before the county court judge on May 2, 1911. He held that he was bound by the award against the company of August 16, 1910, and made his award as follows:—

"I order that the respondents (as receiver and liquidator of the Baptist End Colliery Company Limited) do pay to the applicant the sum of 100*l.* as compensation for personal injury caused to the said William Homer on the 29th day of April 1909."

He also ordered them to pay costs. (1)

The receiver and liquidator appealed.

(1) Workmen's Compensation Act, 1906: "5.—(3.) There shall be included among the debts which under section one of the Preferential Payments in Bankruptcy Act, 1888, and section four of the Preferential Payments in Bankruptcy (Ireland) Act, 1889, are in the distribution of

G. R. Northcote, for the appellants. The question is whether on the facts of this case the workman is entitled to preferential payment. He is not entitled to rank as a preferential creditor against the assets of the company for he never was in the company's employment.

[The COURT observed that neither this point nor the objection that the county court judge had no jurisdiction to order payment was taken before the county court judge, and therefore neither of them could be taken before the Court of Appeal.]

The appeal is against the order for payment.

C. A. Russell, K.C., and *H. H. Joy*, for the respondents, were not called upon.

COZENS-HARDY M.R. This is an appeal from an award of the learned deputy county court judge of Dudley, which comes before us as an appeal under the Workmen's Compensation Act, 1906. It must not be forgotten that these appeals are from the county court judge sitting in his character of arbitrator, and that any appeals from the county court judge sitting strictly in the character of judge for trials of cases, and not as an arbitrator, go to the Divisional Court and not to this Court.

The outlines of the facts are these. The workman, Homer, having met with an accident, made a claim against the company, and the company consented to an award of 16*s.* 3*d.* per week. Very shortly after that a receiver was appointed, not by the Court, but under a power in a debenture deed, which we have not seen. Shortly after that there was a voluntary winding-up of the

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the property of a bankrupt and in the distribution of the assets of a company being wound up to be paid in priority to all other debts, the amount, not exceeding in any individual case one hundred pounds, due in respect of any compensation the liability wherefor accrued before the date of the receiving order or the date of the commencement of the winding up, and those Acts and the Preferential Payments in Bankruptcy Amendment Act, 1897, shall have effect accordingly. Where the compensation is a weekly payment, the amount due in respect thereof shall, for the purposes of this provision, be taken to be the amount of the lump sum for which the weekly payment could, if redeemable, be redeemed if the employer made an application for that purpose under the First Schedule to this Act."

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company. Then an application was made to the learned county court judge under s. 5, sub-s. 3, of the Workmen's Compensation Act, 1906, which provides that where the compensation is a weekly payment the amount due shall be taken to be the amount of the lump sum for which the payment could if redeemable be redeemed if the employer had made an application for the purpose under the First Schedule to the Act. The whole object of that section was to provide that in the course of the winding-up or in bankruptcy sums payable to workmen under the Workmen's Compensation Act, or a commuted sum in respect of weekly payments, should be treated as preferential debts. But that means preferential debts to be dealt with in the bankruptcy or in the winding-up of the company; it does not mean that the learned county court judge sitting as arbitrator under this Act is himself to direct, it may be the High Court, to admit or not to admit a certain debt. What has happened here is this: The award having been made, the workman applied to have the amount redeemed, and the commuted sum assessed under s. 5, sub-s. 3, of the Workmen's Compensation Act, 1906, and paid as a preferential debt, and the learned county court judge has made an award that the appellants, as receiver and liquidator, "do pay" to the applicant the sum of 100*l.* as compensation for personal injury. That is a commutation of the sum. The objection was not taken in the Court below to the jurisdiction of the county court judge to order that payment.

Nothing that falls from me must be taken to express any opinion as to whether the learned county court judge had jurisdiction to make an order for payment. As at present advised—I say no more—I do not think he had. I think he ought merely to have assessed the amount, but that objection was not taken and cannot be taken now.

I am quite clear that this is not an appeal under the Workmen's Compensation Act, and that it is a matter which ought to be brought, if at all, before some tribunal dealing with the administration of the assets of the company either in the hands of the receiver or in the hands of the voluntary liquidator. In my opinion this appeal is misconceived and must be dismissed with costs.

FLETCHER MOULTON L.J. I am also of opinion that this appeal is misconceived. I decline to go more fully into it because all that the Court has before it is the statement of counsel; nothing is brought forward in any way from which the Court can have proper cognizance of the facts of the case or of the position of the parties at the various stages of the litigation to which reference has been made. For these reasons I confine myself to saying that it is not an appeal under the Workmen's Compensation Act and must be dismissed.

FARWELL L.J. I am of the same opinion. If the objection had been taken in the Court below—and as it was not taken it is not open for us to take it—that there was no jurisdiction to do more than declare the amount of the compensation under the last portion of sub-s. 3 of s. 5 of the Workmen's Compensation Act, 1906, I should have thought that objection would probably have succeeded. Sub-s. 3 is merely a direction for priority of payment in a winding-up or in a bankruptcy and does not authorize the learned county court judge sitting as arbitrator to make orders directing the High Court, or the officers of the High Court, or voluntary liquidators or persons appointed as trustees in bankruptcy, or receivers appointed either by the Court or under deed, to make actual payments. His function is confined to assessing the amount. Then the Court which is administering the estate out of which the payment is to be made has to consider and decide what order should be made as to the amount which is so ascertained. If objection had been made to the order to pay the amount, that objection probably would have been allowed. We have not heard Mr. Russell, but he is not concerned in this particular case to say the contrary. It is obviously most inconsistent—to take an extreme case—that in the administration of the company's assets in the High Court it should be met by the order of a learned county court judge, sitting as arbitrator, ordering it to make certain payments in priority. I think, as at present advised, that the Act does not bear that construction, but it is not open to us to consider the objection, and all we have is the amount of 100*l.* assessed as the sum at which the weekly payment would be

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redeemable under the latter part of sub-s. 3, coupled with an order to pay, which in this case the receiver and liquidator will have to obey I suppose at their own risk, and do what they can by an application to the Court if any objection is taken to their paying it out of the assets. I agree that this appeal is misconceived and must be dismissed.

Appeal dismissed.

Solicitors: *Field, Roscoe & Co., for Jobson & Marshall, Dudley; Timbrell & Deighton, for Stanier, Jones, Slater & Camm, Dudley.*

J. R. B.

C. A. 1912 *March* 13.

[IN THE COURT OF APPEAL.]

EGERTON *v.* MOORE.

Employer and Workman—Compensation—Notice of Accident—Twelve Months' Delay—Latent Injury—Employer prejudiced in Defence—"Mistake or other reasonable cause"—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 2, *sub-s.* 1.

A workman who seeks to obtain the benefit of the proviso to sub-s. 1 of s. 2 of the Workmen's Compensation Act, 1906, in respect of failure to give notice of the accident as soon as practicable after the happening thereof, must prove affirmatively that the employer has not been prejudiced thereby, otherwise the circumstances may be such as to lead the Court to conclude that the mere lapse of time must necessarily have prejudiced the employer in his defence.

A workman who has sustained an injury of such a latent nature that he does not know for some time whether it will have any serious result may make a mistake of fact, within the meaning of "mistake" in the proviso to sub-s. 1 of s. 2 of the Act, in not giving notice as soon as practicable after the happening of the accident, but so soon as he realizes that he is suffering from some ailment upon which he may have occasion to rely as a consequence of the accident, he should give notice to his employer, and his failure so to do, even though it proceed from a desire to do the best for himself or his employer, will not amount to "mistake or other reasonable cause" within the proviso to the sub-section.

The meaning of "mistake" discussed.

The observations of Lord Adam in *Rankine* v. *Alloa Coal Co.* (1904) 41 Sc. L. R. 306; 6 F. 375, relative to "mistake" commented upon.

THIS was an appeal from the decision of the judge of the Northwich and Winsford County Court that the applicant was not

entitled to compensation under the Workmen's Compensation Act, 1906, in the following circumstances :—

On July 21, 1910, the applicant, who was a navvy, was excavating a trench when he slipped and fell into the trench, his left breast striking the top of his pickshaft. After ten minutes' rest he was able to go on working for the rest of the afternoon, but on the next day and for a few days afterwards he was unable to work owing to the pain, and so informed the respondent, to whom he shewed the place on his chest "swelled up like a ball," but he made no claim then and did not know that he could do so. The place became better, and on July 27 he was able to resume work, but for another employer.

After the swelling went down in July, 1910, the applicant had no trouble with his breast except tenderness and intermittent pain until February or March, 1911, when it swelled again and a tubercular abscess commenced to form. In February he thought sufficiently much of it to cause him to put down in a book the date of the accident so that he could remember it. The applicant nevertheless worked on and off for different employers, earning full wages, from July 27, 1910, to May 25, 1911, when he was obliged to consult a doctor for his injury. Under medical advice he underwent an operation in the Manchester Infirmary in August, 1911.

In June, 1911, he told the respondent that he had been ordered into the infirmary, but even then he made no claim.

On July 18, 1911, the applicant's solicitors wrote to the respondent claiming compensation as from May 25, 1911, and, in reply, liability was denied.

The county court judge held that the notice of the accident had not been given "as soon as practicable after the happening thereof"; that the applicant had failed to shew that the employer was not prejudiced in his defence by such want of notice; and that the failure to give notice or make a claim was not occasioned "by mistake or other reasonable cause."

The applicant appealed.

The effect of the medical evidence on the hearing of the applica- before the county court judge is stated in the following judgment of the Master of the Rolls.

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T. W. H. Inskip, for the appellant. Written notice was not given in this case within six months of the accident, in compliance with the requirements of s. 2, sub-s. 1, of the Act of 1906, but that is subject to the proviso at the end of that sub-section. This appeal rests on two grounds contemplated by the proviso, namely, that the employer was not necessarily prejudiced by the want of notice and that the failure to make a claim was due to mistake or other reasonable cause.

With regard to the question of prejudice to the employer, there was no evidence before the county court judge to shew that the employer was prejudiced. There is no reason why mere flight of time must occasion prejudice to the employer. The delay must be such as that thereby the employer must necessarily be prejudiced: *M'Lean* v. *Carse & Holmes*. (1) Verbal notice was in fact given the day after the accident, and a further statement was made by the applicant to the employer in June, and although not sufficient to comply with the provisions of the Act as to written notice it may be sufficient to shew that the employer was not prejudiced: *Stevens* v. *Insoles, Ld.* (2) The county court judge should not have rejected the medical evidence.

On the question of "mistake or other reasonable cause" the Scottish case of *Rankine* v. *Alloa Coal Co.* (3) is in point.

[FLETCHER MOULTON L.J. Mistake does not merely mean that the workman does not do what is wise.]

The appellant relies also on *Hoare* v. *Arding & Hobbs* (4) and *Moore* v. *Naval Colliery Co.* (5) Although the applicant made a note of the accident in the following February or March he was still under the honest mistake that his injury was not so bad as it turned out to be. There was no claim which he could have made within the six months. He was only away from work for five days and had merely a prospective or contingent claim. As in *Hoare* v. *Arding & Hobbs* (4) he did not know that he was seriously ill. He gave notice as soon as he appreciated the serious nature of his injury.

This is a case in which the Court will say that the correct

(1) (1899) 36 Sc. L. R. 678.
(2) [1912] 1 K. B. 36.
(3) 41 Sc. L. R. 306; 6 F. 375.
(4) (1911) 5 Butt. W. C. C. 36.
(5) (1911) 5 Butt. W. C. C. 87.

inference from the facts is that the man made an honest mistake in his employer's favour in not giving notice and that he is entitled to the benefit of the proviso.

G. A. Scott, for the respondent, was not called upon.

COZENS-HARDY M.R. I have come to the conclusion that we cannot possibly interfere with the decision of the learned county court judge.

The claimant was working as a navvy, excavating. On July 21, 1910, his pick, somehow or other, struck him in the chest and there was a swelling. He continued his work that day, after resting ten minutes or so, but the next day and for a few days afterwards he stayed away from his work. Then on July 27 he did not go back to his old employer, but he resumed work with another employer, and then he worked on full wages with slight intervals until May 25, 1911. In June he told the respondent that he had to go to the hospital—I suppose for an operation—and his employer then told him he was insured, and on July 18 for the first time an application for compensation was made under the Act.

Now there are a good many difficulties in the way. In the first place the effect of s. 2, sub-s. 1, of the Act of 1906 is quite explicit. [The Master of the Rolls read the sub-section down to the proviso, and continued:] It is conceded that notice certainly was not given as soon as was practicable, and it is also plain that the claim for compensation was not made within six months from the occurrence of the accident, but Mr. Inskip says, and with great force, that that is all subject to the proviso, and the proviso which immediately follows is this: [The Master of the Rolls read the proviso, and continued:] It is quite true that the want of notice may be got over if the case can be brought within the proviso.

Now the first thing that occurs to me is this. A workman must prove affirmatively—i.e., the burden is on him to shew—that the employer has not been prejudiced, or if the employer has been prejudiced, the workman must prove that the want of notice was occasioned by a mistake or other reasonable cause. In my opinion the appellant fails on both grounds. Then it was

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said that the learned judge was wrong in holding that the employer was prejudiced by the delay. That is not quite the way in which it ought to have been put. What the learned judge in effect held was that the workman had not proved that the employer was not prejudiced. The burden is upon the workman to establish that proposition.

The learned judge has referred to the evidence of the doctors, which I have looked at. He has referred to the evidence of the applicant that he undoubtedly knew in February or March that that from which he was suffering some pain was due to the accident on July 21, and that he then made a memorandum in some book of his of the particular date of the accident. He did not even then inform the employer at the earliest reasonable moment. He went on for months afterwards before the necessary step was taken. I think this Court has upon more than one occasion—and I think particularly in the case of *Burrell* v. *Holloway Brothers (London), Ld.* (1)—laid down that which, speaking for myself, I think is the true view: that there may be circumstances in which res ipsa loquitur, when it is quite obvious that the situation must be changed. For when you are considering what happened more than twelve months ago on a particular day, it is very different from considering what happened six months after, or shortly after, the accident.

Now here one of the doctors says that the abscess from which the man ultimately suffered might not have formed for two or three months; the abscess might have resulted from something after July, 1910, but more probably it was due to this accident—you cannot fix a time. The other doctor says it might have been due to a variety of causes. In the face of that, it is impossible for us to say that the workman has affirmatively established what he had to prove, namely, that the employer was not prejudiced. I am bound to answer that question as the learned county court judge has done, that is to say, I cannot differ from the decision at which he has arrived.

But then, is it a case in which the want of notice has been occasioned by mistake or other reasonable cause? What

(1) (1911) 4 Butt. W. C. C. 239.

mistake? Clearly there was no mistake after February. And we must take into consideration his conduct during the whole time. Then was there any other reasonable cause? I have not heard any reasonable cause suggested for it, except that the man did not really appreciate the extent of the mischief, and from that point of view mistake and reasonable cause would really run into the same proposition of law. I am not sure that anything I have said is necessarily inconsistent with anything that was said in the Scottish case of *Rankine* v. *Alloa Coal Co.* (1) I need not say that anything coming from the Court of Session is to be treated with the utmost respect, but there are some remarks of Lord Adam which do seem to me, with the utmost respect, to be inconsistent with the view taken by this Court in similar cases and which, on consideration, I am not prepared to follow. "Mistake" we have held does not mean mistake of law. In *Roles* v. *Pascall & Sons* (2) the workman said he had never heard of the Workmen's Compensation Act at all, and we decided that that was not a mistake within the meaning of the section. That is a case in which in one at least of the views suggested by Lord Adam there was an undoubted mistake which must have brought it within the section, but this Court has refused to take that view.

Then as to "reasonable cause." There have been several instances which have illustrated the view which this Court has taken on that. I do not know that you can find a better one than the recent case of *Hoare* v. *Arding & Hobbs* (3), where we declined to differ from the decision of the county court judge who had held that delay to give notice or make a claim on the part of a lady who had sustained no outward apparent physical injury, but whose nerves were affected by the alarm and shock of a fire, was due to reasonable cause, and we held that where the injury was not apparent at the time there was good and reasonable ground for her not making her complaint at the time. There the learned county court judge had held on the evidence that the employers were not prejudiced by reason

(1) 41 Sc. L. R. 306; 6 F. 375. (2) [1911] 1 K. B. 982.
(3) 5 Butt. W. C. C. 36.

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of the delay because he was satisfied that nothing more could have been discovered even if they had had due notice of the accident.

The present case is one in which I might say I have great sympathy with the workman because I think he really did his best to get his livelihood as a workman. But notwithstanding that, I think we should not be administering the law as declared by s. 2 if we did not hold that he had not brought himself within the proviso.

For these reasons I think the appeal fails and must be dismissed with costs.

FLETCHER MOULTON L.J. I am of the same opinion. I think the Court has received every possible assistance from the able argument of Mr. Inskip on behalf of the appellant, but it has not in my opinion shewn that we can in any way interfere with this decision of the learned judge.

It must be borne in mind in this case that the learned judge has found that it has not been shewn that the employer was not prejudiced and that it has not been shewn that the delay in giving notice was due to mistake or other reasonable cause, and if there is evidence to support those findings the decision must stand.

Now with regard to the question that it has not been shewn that the employer was not prejudiced, I think the point is almost unarguable. The medical evidence shewed that the abscess might have come from other causes, although it most probably came from this blow, but it must be remembered that the ultimate mischief was only an indirect consequence of the blow. The blow would not produce the tubercular abscess, but, like any other lesion of the tissues, it might produce a state of things which would cause the tubercular tendency which was in the man's system to shew itself there. Other lesions might have caused it to shew itself elsewhere.

Under these circumstances I cannot think it is possible to say the master was not prejudiced by not having notice of it at a time much nearer to the occurrence of the accident. The employer would then have been on a fresher scent than he was when he

was finally told in July of the next year. I am satisfied that that finding was reasonable.

Now I turn to the question of mistake or other reasonable cause. In my opinion, it is clear that the workman as early as February, if not before, knew that he was suffering from something which he might have to claim to be a consequence of the accident. It was his business then, at once, to give notice. If he had given notice then, I think he would have had a strong case for saying that up to that time he had not any idea that there was anything more than a bump which he thought would pass away. But I cannot think it was reasonable for him to withhold notice from his master then, and therefore I am satisfied in my own mind that there was evidence which justified the learned judge in coming to the conclusion he did. Beyond that I do not go. I think the appeal must be dismissed.

BUCKLEY L.J. I am of the same opinion, and for the same reasons. I wish to add a word as to the meaning of "mistake" in s. 2 of the Act of 1906. There are expressions in the judgment of Lord Adam in *Rankine* v. *Alloa Coal Co.* (1) which might be used to sustain an argument that the two expressions "to make a mistake" and "to take a wrong course" are equivalent expressions. Lord Adam said this: "He made a mistake, I think, in not more implicitly following the advice of his doctor." That is not a mistake within the Act of Parliament. Again, "He went from time to time to the pit and did light work, but that was the mistake he made. He thought his injury was not so serious as it was." Again, "He said 'I have been all my life in the employment of these people. I am not going to lodge a claim against them for any light cause. I think my injuries not very serious, and for that reason I am not going to make a claim.' That was his mistake." If that were correct, it would cover, no doubt, such a case as this, but I do not think that "mistake" in the Act of Parliament means "taking a wrong course." Let me instance what might be a mistake,—Assume a person who has sustained an injury which, for the time being, is latent. He does not know whether it is

(1) 41 Sc. L. R. 306; 6 F. 375.

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going to result in anything serious or not. He may for some time be under a mistake of fact whether he has really received an injury, and may not give notice. That would, I think, be a mistake within the meaning of the word in the Act of Parliament. That is illustrated by the two cases of *Hoare* v. *Arding & Hobbs* (1) and *Moore* v. *Naval Colliery Co.* (2)

In *Hoare* v. *Arding & Hobbs* (1) the woman was employed in a draper's shop where there was a bad fire. She was not injured by the fire, but she received an excessively violent nervous shock. It appears that for nights after she dreamed the fire all over again and her nervous system was altogether upset. How far that was serious would at the time be a question of great doubt. If the shock had not been very serious she might get over it in a few days, but it might on the other hand affect her for life. She was as the event proved very seriously affected, and in her case it turned out to be for life. This is what I call a latent injury. It is very difficult to measure the effect of a severe nervous shock, and she did not know whether it was serious or not. That, I conceive, was a mistake. But as from February or March, 1911, the present was not a case of that kind.

After those expressions of opinion on the meaning of "mistake" I am not going on to deal with the question of prejudice. I agree with all that has been said and I think the appeal fails.

Appeal dismissed.

Solicitors: *Guscotte, Wadham & Co., for Milling & Moss, Northwich; Smiles & Co.*

(1) 5 Butt. W. C. C. 36.

(2) 5 Butt. W. C. C. 87.

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[IN THE COURT OF APPEAL.]

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TUCKER *v.* OLDBURY URBAN DISTRICT COUNCIL.

Employer and Workman—Compensation—Death resulting from Accident—Claim of Dependants—Cause of Injury—Statements of Deceased before Claim made—Admissions—Declarations against Interest—Inadmissibility—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58).

Statements made by a deceased workman, a blacksmith, to the general manager of his employers as to the nature and cause of an injury to his thumb which ultimately resulted in his death—

Held not admissible on behalf of the employers in an application by the deceased's dependants for compensation under the Workmen's Compensation Act, 1906, as admissions by the deceased, inasmuch as the applicants had, as dependants, a direct statutory right against the employers under Sched. I. (1.) (*a*); the deceased workman was not a party to the litigation; and the applicants did not derive their title to compensation by derivation from him.

The statements were to the effect that in answer to the manager's question what was the matter with his thumb the deceased replied that he had a whitlow on his thumb, and in reply to a further question whether he had been hammering his thumb the deceased replied "No."

Held, further, that the statements were not admissible as declarations against interest, inasmuch as it must be shewn that the statements were to the knowledge of the deceased contrary to his pecuniary interests, and the statements in question did not satisfy that requirement, for when they were made no claim had been put forward nor was there any reason to believe that the workman knew that he ever would be able to make a claim. Moreover the particular statements in question were not necessarily against the interests of the deceased, for neither of them was of such a nature as to be inimical to, or to militate against the success of, a claim on his part, if he had lived to make one.

THIS was the employers' appeal from the award of the judge of the West Bromwich County Court under the Workmen's Compensation Act, 1906, in favour of the dependants of a deceased workman.

The grounds of appeal were that the judge was wrong in law in rejecting evidence of the statements of the deceased workman, and that there was no evidence that the deceased workman died by reason of an accident arising out of and in the course of his employment.

The deceased was in the employment of the appellants at their

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Oldbury gasworks as a blacksmith, and the evidence for the applicants was to the effect that on June 6, 1911, while in the course of his work, a foreign body, such as a piece of steel or iron, was driven under his thumb-nail, causing, according to the medical evidence, septic poisoning leading to septicæmia resulting in death. He continued working until June 19, when he first consulted a doctor, and died on June 27.

At the hearing of the application before the county court judge the employers called their general manager, who deposed that he saw the deceased on June 19 with his thumb wrapped up, and that he asked deceased what was the matter. Counsel for the employers then asked the witness what reply the deceased had given. Objection was taken to this question, on the ground that the statements of the deceased workman were not admissible in evidence. The judge upheld the objection, and ultimately found that the deceased met with an accident in the course of and arising out of his employment by the appellants, thereby injuring his thumb, and that that injury caused the septic poisoning resulting in death, and awarded compensation to the applicants.

From this decision the employers appealed.

During the hearing of the appeal, the Court, at their request, were informed that the statement of the deceased in answer to the manager's question was to the effect that he had a whitlow on his thumb. To the witness's further question whether he had been hammering his thumb the deceased replied "No."

Douglas Knocker, for the appellants. The county court judge was wrong in law in rejecting evidence of the statements of the deceased workman. It was admissible on two grounds, namely, as an admission and as a declaration against interest. It was an admission because it was an oral statement relevant to the fact in issue and made by one who was privy in blood to the applicants: Stephen's Digest of the Law of Evidence, arts. 15 and 16.

The statement was also admissible as being a declaration made by the declarant in the ordinary course of business and in the discharge of professional duty soon after the accident: *Doe*

v. *Turford* (1); *Price* v. *Torrington* (2); Stephen's Digest, art. 27. It is the statutory duty of a workman at once to report the accident and give notice to the manager, who is practically the employer, and such notice would be good: *Stevens* v. *Insoles, Ld.* (3); and it is the manager's duty to discover whether or not any accident is alleged.

In *Butt* v. *Gellyceidrim Colliery Co., Ld.* (4) a verbal notice established by hearsay evidence was held to be a good notice. The statements negative any such oral notice. They were an admission that the deceased had not had an accident. The statements were also declarations against interest.

[FLETCHER MOULTON L.J. They must be consciously against his interest.]

He knew the law and that he would have a claim under the Act. A workman's right to compensation is vested at his death and also at the time of the accident—*United Collieries* v. *Simpson* (5)—and therefore the declaration would be consciously against his pecuniary interest and admissible: Stephen's Digest, art. 28; Taylor on Evidence, ss. 669, 670. There is no real difference between a written statement and an oral communication: *Bewley* v. *Atkinson* (6); *Higham* v. *Ridgway*, (7)]

E. W. Cave, for the respondent, the widow. *Bewley* v. *Atkinson* (6) was a question with regard to the very matter in dispute in the action between either the parties or the predecessor in the same right. The transaction in respect of which the statements are made and in respect of which the proceedings are being carried on must be the same transaction.

The applicant can prove her case aliunde. She has no difficulty in proving the fact of the poisoned finger and what was the cause of death.

The statement was not a declaration against interest; it was nothing more than the opinion of the workman on the state of things at the time and was not intended to affect his pecuniary relations with his master.

(1) (1832) 3 B. & Ad. 890.
(2) (1703) 1 Salk. 285; 2 Sm. L. C. 320.
(3) [1912] 1 K. B. 36.
(4) (1909) 3 Butt. W. C. C. 44.
(5) [1909] A. C. 383, 398.
(6) (1879) 13 Ch. D. 283.
(7) (1808) 10 East, 109; 2 Sm. L. C. 327.

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The statement of the deceased workman was not admissible: *Amys* v. *Barton* (1); *Gilbey* v. *Great Western Ry. Co.* (2)

Douglas Knocker in reply. If the statement is not evidence, then the dependants are put in a better position than the man himself would have been if he had been alive. It was either a declaration against interest or an admission by him. It was his duty to account to the manager for his absence from work and this answer was given in the course of his duty. *Amys* v. *Barton* (1) and *Gilbey* v. *Great Western Ry. Co.* (2) do not apply because the master was not there. In one the statement was made to the doctor and in the other to the wife; but that is not so here.

Cur. adv. vult.

March 21. FLETCHER MOULTON L.J. delivered the following considered judgment dismissing the appeal:—

This is an employers' appeal against the decision of his Honour Judge Howard Smith in an application for compensation under the Workmen's Compensation Act to the dependants of W. H. Tucker, a deceased workman.

The point raised is that the learned judge was wrong in law in rejecting evidence of certain alleged statements of the deceased workman under the circumstances hereinafter appearing.

The evidence for the applicants was to the effect that in the course of his work a foreign body (such as a piece of steel or the like) was driven under his thumb-nail and caused septic poisoning leading to septicæmia. The accident was alleged to have been on June 6, and the workman continued working until June 19, and death occurred on June 27.

The respondents called their general manager, who deposed that he saw Tucker on June 19, the day he left off work, and that he then had his thumb wrapped up. He then said that he asked him what was the matter. Counsel for the respondents proceeded to ask him what reply the deceased man had given. Objection was taken to this question being answered on the ground that the

(1) [1912] 1 K. B. 40.
2) (1910) 102 L. T. 202; 3 Butt.W. C. C. 135.

statements of the deceased workman were not admissible in evidence. The judge upheld the objection, and it is against this decision that the present appeal is brought.

Counsel for the appellants sought to support the appeal on two grounds, i.e., (1.) that the statements of the deceased workman were admissible as admissions, and (2.) that they were admissible as declarations against interest.

With regard to the first of these grounds, I am of opinion that it is untenable. The applicants in the present case have as dependants a direct statutory right against the employer under Sched. I. (1.) (*a*); the deceased workman is not a party to the litigation, nor do they derive their title to compensation by derivation from him. No admission therefore made by him can be evidence against the present applicants.

The second objection gives rise to more difficulty. To decide whether it applies one must of course know the nature of the declaration in order to judge whether or not it was a declaration against interest on the part of the deceased. We were informed that the statements were to the effect that he had a whitlow on his thumb, and that on the witness further asking him whether he had been hammering his thumb the deceased said "No."

This ground of admissibility has nothing whatever to do with the fact that the deceased was the workman himself. It would apply equally to a declaration against interest on the part of any witness. Such declarations are admitted as evidence in our jurisprudence on the ground that declarations made by persons against their own interests are extremely unlikely to be false. It follows therefore that to support the admissibility it must be shewn that the statement was to the knowledge of the deceased contrary to his interest. And it is now settled that the declaration must be against pecuniary interests (or against proprietary interests, which is much the same thing): see *Sussex Peerage Case* (1) and the judgment of Blackburn J. in *Smith* v. *Blakey*. (2)

In my opinion the proposed statements fail to satisfy the requirements of the law and the evidence was rightly rejected. At the date when they were made no claim had been made, and there is no reason to believe that the workman knew that he ever

(1) (1844) 11 Cl. & F. 85. (2) (1867) L. R. 2 Q. B. 326, 332.

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would be able to make a claim. Up to that moment there had been no incapacity. He had continued working as usual and he undoubtedly was unable at that time to foresee the rapid and fatal development of the mischief. It must be remembered that if the incapacity lasts less than two weeks no compensation is payable in respect of the first week.

But apart from this I am of opinion that the statements themselves were not necessarily against the interest of the decease . The description of the trouble in his thumb as a whitlow was in the mouth of an ordinary workman a natural description which does not seem to me to be, when properly understood, contrary to the facts of the case or inimical to a claim on his part, if he had lived to make one. A whitlow is a septic condition resembling very much the early stages of such an affection as that of which the workman died. Nor does the statement that he had not been hammering his thumb appear to me to militate against the success of any such claim. It certainly does not amount to a statement that he had not while working run a piece of iron or steel under his nail.

But although I have examined these statements from the point of view whether they are statements which would have been against the interests of his claim had he made a claim, I base my decision on the fact that he had not made a claim nor could be shewn to have known that he could make a claim, and that therefore they were not declarations against his pecuniary interests. It is not sufficient that they should be such as it turns out were against his interests. For instance, the record by a deceased man of a contract will not become admissible because it turns out that the contract would have been a very disastrous one : see *Massey* v. *Allen*. (1) It is therefore immaterial to consider whether these statements would assist the employers in resisting the present claim or not. The claim had not been made or the grounds formulated, and therefore there was nothing in the statements which at the time entitled them to be viewed as against the pecuniary interest of the person making them.

I am therefore of opinion that this appeal should be dismissed with costs.

(1) (1879) 13 Ch. D. 558.

COZENS-HARDY M.R. I agree.

BUCKLEY L.J. I agree.

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Appeal dismissed.

Solicitors: *Dawes & Sons, for T. Haynes Duffell, Birmingham; Bonser & Dawes, Oldbury.*

R. M.

SMITH'S DOCK COMPANY *v.* JOHN READHEAD & SONS.

1912 *April* 24, 25.

Employer and Workman—Injury resulting in Death of Workman—Negligence of Persons other than Employer—Sole Dependant Illegitimate Child—Payment of Compensation by Employer—Right of Indemnity against Persons causing Injury—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 6.

By s. 6 of the Workmen's Compensation Act, 1906, "Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof,—(1.) The workman may take proceedings both against that person to recover damages and against any person liable to pay compensation under this Act for such compensation, but shall not be entitled to recover both damages and compensation; and (2.) if the workman has recovered compensation under this Act the person by whom the compensation was paid . . . . shall be entitled to be indemnified by the person so liable to pay damages as aforesaid."

A workman while working in the employment of the plaintiffs sustained injuries from which a few days later he died. The injuries were caused by the negligence of the defendants' servants. The workman left as his sole dependant an illegitimate daughter. The plaintiffs having paid her compensation under the Workmen's Compensation Act, 1906, sued the defendants under s. 6 of that Act for an indemnity in respect of the compensation so paid by them. For the defendants it was contended that, as no action could be maintained under Lord Campbell's Act for the benefit of the illegitimate daughter, s. 6 did not apply:—

Held, that the provisions of that section did not require that the person recovering the compensation and the person to whom the wrongdoer was liable to pay damages should be the same person; that as there was an interval of time between the infliction of the injury and the death of the workman there was during that time a legal liability to pay damages to him; that the fact of the liability so created being subsequently abated by his death did not prevent the application of the section; and that the plaintiffs were entitled to recover.

POINT of law raised on the pleadings.

The plaintiffs were dock owners and ship repairers. The

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defendants were shipbuilders. The plaintiffs in their business employed one Cuthbert Sinclair as a shipyard labourer. The plaintiffs entered into a contract with the defendants for the execution by the plaintiffs of certain work upon a certain ship while in the plaintiffs' dock. On February 14, 1911, Sinclair was working for the plaintiffs at the work so contracted for on board the ship in the dock when he sustained injuries which resulted in his death on February 18, by reason of the fall of a watertight door upon him. An award under the Workmen's Compensation Act, 1906, was made by the judge of the South Shields County Court whereby the plaintiffs were directed to pay the sum of 203*l.* 6*s.* 1*d.* into the said county court in respect of the claim for compensation under the Act of Margaret Ellen Battersby, the illegitimate infant daughter of Sinclair, who was thereby found to be the sole dependant upon his earnings and to be totally dependent thereupon. The plaintiffs duly paid the said sum so awarded, and also incurred certain expenses in investigating and resisting the claim. The death of Sinclair was caused by the negligence of the defendants' servants in raising and leaving the watertight door without properly securing it. The plaintiffs claimed that the injury to Sinclair was caused under circumstances creating a legal liability in the defendants to pay damages in respect thereof, and that the plaintiffs were entitled under s. 6 of the said Act (1) to be indemnified by the

(1) By the Workmen's Compensation Act, 1906, s. 6, "Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof,—

"(1.) The workman may take proceedings both against that person to recover damages and against any person liable to pay compensation under this Act for such compensation, but shall not be entitled to recover both damages and compensation;

and

"(2.) If the workman has recovered compensation under this Act the person by whom the compensation was paid . . . . shall be entitled to be indemnified by the person so liable to pay damages as aforesaid, and all questions as to the right to and amount of any such indemnity shall in default of agreement be settled by action, or, by consent of the parties, by arbitration under this Act."

defendants in respect of the compensation so paid and the expenses so incurred. The defendants contended that they were not persons under any legal liability to pay damages within the meaning of the section, and that the plaintiffs were not entitled to the indemnity claimed.

McCall, K.C., and *E. Meynell*, for the plaintiffs. Wherever the condition, contained in the first paragraph of s. 6, as to the circumstances of the injury having created a legal liability in a third person to pay damages, is satisfied, the employer who has paid compensation to the workman or his dependants is entitled to an indemnity from the person upon whom that legal liability rested. Here that condition was satisfied, for the injury was caused by the negligence of the defendants, who were consequently liable to pay damages to the injured workman. It is true that that liability ceased with the workman's death, but that fact is immaterial and does not prevent the application of the section. Then, under those circumstances, "if the workman has recovered compensation"—and here the workman did so recover it, for by s. 13 any reference to a "workman" where he is dead includes a reference to his "dependants," which latter term by the same section includes an illegitimate child—the persons so liable to pay damages, here the defendants, are liable to indemnify the persons by whom the compensation was paid, that is to say, the plaintiffs. In *Cory & Son* v. *France* (1) Vaughan Williams L.J. suggested that the employer is entitled to an indemnity from the defendant wherever the workman would have had a cause of action for the injury against the defendant. He says: "The Legislature is anxious, because it thinks it just, that the wrong-doer who has by his wrong action brought about the result shall not get off scot free; and I think that the test prima facie to apply is the answer to the question, Would the workman have a good cause of action against this person other than his employer?" Therefore the plaintiffs here are entitled to recover.

Scott Fox, K.C., and *Adair Roche*, for the defendants. Sect. 6 has no application to the facts of this case. The intention of the section was that where the workman has a double remedy,

(1) [1911] 1 K. B. 114, at p. 124.

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namely, a claim for compensation against his employer and a right of action for damages against a stranger, he may elect which remedy he will pursue, and if he elects to claim compensation the employer upon paying it is entitled to be indemnified by the stranger. But except where the circumstances give rise to a right of election in the workman there can be no right of indemnity in the employer. No doubt the expression "workman" includes a dependant, but it is not enough to bring a case within the section that the injured workman should have had a cause of action for damages and that his dependant should have a claim for compensation; the two remedies must co-exist in the same person, in the injured workman or in his dependant as the case may be. Moreover the sums claimable by those two remedies must be substantially co-extensive in amount, that is to say, if the compensation claimed be in respect of the injured workman's death, the cause of action must also be in respect of his death. It cannot have been intended that because the stranger was liable to pay a small sum to the workman as damages he shall be liable to pay a much larger sum by way of indemnity to the employer. Here the two remedies for the workman's death could not co-exist in the dependant, for she was illegitimate, and Lord Campbell's Act gives no right of action to an illegitimate child. If the object of the Legislature was to make the stranger liable to indemnify the employer in all cases in which the injury resulted from the stranger's wrongful act, it has failed to carry out that object consistently, for it is obvious that in such a case as the present if the workman, instead of surviving the infliction of the injury for a time, had been killed outright there would have been no right of action for damages in any one, and consequently no right of indemnity in the employer.

BRAY J. The construction of the Workmen's Compensation Act has before now given rise to considerable difficulty, and the question which I have to decide in the present case is by no means easy of solution. The case is this. A workman who was working in the employment of the plaintiffs was injured, and four days later died from the effects of his injuries. His illegitimate

daughter, who was the only person dependent on his earnings, claimed and recovered compensation under the Act from the plaintiffs. Thereupon the plaintiffs brought this action under s. 6 claiming an indemnity from the defendants by whose negligence it is conceded the deceased workman's injuries were caused. It is true that under Lord Campbell's Act the man's daughter would have had no right of action against the defendants for damages, for she was illegitimate, and therefore was not one of the class of persons for whose benefit an action might be brought under that Act. Under those circumstances the question arises whether the plaintiffs are entitled to the indemnity claimed. Now in construing a statute the important rule to be observed is that the language should be interpreted according to its natural meaning, and what the section says is this : " Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof," certain consequences shall follow. Here the injury was so caused under circumstances creating a legal liability in persons other than the employers, namely, in the defendants, and the person to whom they were so liable to pay damages was the workman whose injury was caused by their negligence, and that liability was not the less created because it subsequently came to an end by reason of the man's death. If then the words of the section that I have read be given their natural meaning it would seem that the facts of the case fall within them unless there is something in the later parts of the section to modify that view. Mr. Scott Fox contended that sub-s. 1 shewed that the section was only intended to apply to cases in which the person claiming the compensation had a double remedy, which admittedly the daughter in the present case had not. It is true that the sub-section does contemplate a double remedy, but I do not think that it was thereby intended to limit the operation of the earlier words. Its object was only to prevent the workman or his dependants from enforcing the double remedy and recovering the money twice over. Then we come to sub-s. 2, which provides that " if the workman has recovered compensation under this Act the person by whom the

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compensation was paid . . . . shall be entitled to be indemnified by the person so liable to pay damages as aforesaid." That refers to the words in the earlier part of the section and means that the indemnity is to be paid by the person in whom the legal liability to pay damages was created. Here again I can see nothing in the sub-section to limit the effect of the earlier part. It does not appear to me that this view will result in any injustice or will bring about consequences not intended by the Act. The general object of the Act was to make the employer liable to pay compensation for injuries sustained in the employment. But then it was felt to be very hard that this new burden of paying compensation should be put upon the employer when the injury was caused by the wrongful act of a third person, and accordingly it was provided that the wrong-doer should not escape the consequences of his act, but should indemnify the employer against the compensation which he had to pay. I do not think it was intended that this provision should be affected by the death of the workman or that there is anything unjust in holding that the defendants are liable to pay. The earlier words of s. 6 make the defendants persons in whom there was created a legal liability to pay damages, and there is nothing in the later words to cut down their effect. There must be judgment for the plaintiffs.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Crossman, Pritchard & Co., for Dees & Thompson, Newcastle-upon-Tyne.*

Solicitors for defendants: *Rawle, Johnstone & Co., for Newlands & Newlands, South Shields.*

J. F. C.

MANLEY & SONS, LIMITED *v.* BERKETT.

1912
April 1.

Auctioneer—Special Property—Action for Price of Goods Sold—Debt due from Owner to Purchaser—Set-off.

The plaintiffs, a firm of auctioneers, were employed by F., a farmer and cattle dealer, to conduct sales of cattle by auction. F. being pressed by certain creditors induced them to hold their hands by giving them orders directing the plaintiffs to pay the debts, amounting to 864*l.* 11*s.* 8*d.*, out of the proceeds of an intended sale. The plaintiffs assented to this arrangement. Pending the sale the plaintiffs lent money to and did work for F. upon the terms that they should repay themselves the amount of 62*l.* 11*s.* 6*d.* out of the proceeds of the sale. The plaintiffs' commission and charges in respect of the sale amounted to 32*l.* 13*s.*

For the purposes of the sale F. bought on credit from the defendant, who was also a cattle dealer, certain cattle at the price of 164*l.* 4*s.* At the sale F. induced the defendant to bid for and buy certain cattle at the price of 195*l.* on the terms that he should be at liberty to set off the 164*l.* 4*s.* against the 195*l.* The plaintiffs had no notice of this arrangement. The sale realized 987*l.* 2*s.* 6*d.*, including the price of the cattle bought by the defendant.

In an action by the plaintiffs against the defendant to recover the sum of 195*l.* the defendant as to 30*l.* 16*s.* pleaded payment. Against the balance of 164*l.* 4*s.* he claimed to set off the sum of 164*l.* 4*s.*, the price of the cattle sold by him to F.:—

Held, that as to 27*l.* 6*s.* 4*d.*, the amount by which 987*l.* 2*s.* 6*d.*, the proceeds of the sale, exceeded 959*l.* 16*s.* 2*d.*, the sum of the plaintiffs' claims against F. and the debts of F.'s creditors, the set-off was good; but bad as to the residue of the plaintiffs' claim remaining unpaid.

Trial of action at Chester Assizes before Bankes J. without a jury.

The following statement of facts is taken from the written judgment of the learned judge: One Ford was a farmer and cattle dealer who had been in the habit of having periodical sales of cattle by auction. He had employed the plaintiffs to act for him as auctioneers at these sales. He proposed having a sale in the autumn of 1911, and, finding himself in financial difficulties, he had persuaded certain of his creditors to hold their hands and not to press him by giving them orders directing the plaintiffs to pay these creditors out of the proceeds of the intended sale. These orders were communicated to the plaintiffs before the sale, and they had expressed their willingness to act upon them.

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Pending the sale Ford had borrowed moneys from the plaintiffs and had asked them to pay moneys for him and to do certain work for him upon the terms that the plaintiffs should be at liberty to repay themselves out of the proceeds of the sale. The defendant was a farmer in a similar way of business to that of the plaintiff. Shortly before the date fixed for the sale Ford found that he had not got a sufficient number of cattle to make up a good sale. He accordingly proceeded to purchase more. He was obliged to buy them on credit, and he was anxious to get the plaintiffs to consent to give the vendors an undertaking to pay for these cattle out of the proceeds of the sale, but this they refused to do. The defendant was one of the persons from whom Ford bought cattle on credit. The price of the cattle bought from the defendant was 164*l.* 4*s.*, and Ford had promised to pay the defendant for the cattle after the sale and out of the proceeds of the sale. The sale was held on September 14, 1911; it was announced as being held upon the usual conditions, including the condition that the price of any cattle bought was to be paid to the auctioneer. As the sale was proceeding Ford asked the defendant to help the sale by bidding for cattle. This the defendant was unwilling to do, as Ford owed him already a considerable sum of money for the cattle which he had purchased from him, and he was only induced to do so by Ford promising that the price of any cattle he bought might be set off against the debt. On this promise the defendant bid for and bought a number of cattle the purchase price of which amounted to 195*l.*

No notice was given to the plaintiffs of the arrangement come to between the defendant and Ford. Owing to some misunderstanding the defendant and the auctioneers' clerk missed each other after the sale, so that the natural opportunity for mentioning the arrangement before the removal of the cattle did not occur. Both the auctioneer and his clerk had left before the defendant removed the cattle, and, owing to his being a well-known man, no steps were taken to prevent his doing so before paying for them. The sale realized altogether 987*l.* 2*s.* 6*d.* including the purchase price of the cattle bought by the defendant, or 792*l.* 2*s.* 6*d.* excluding that sum.

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The position of the parties after the sale was as follows:— As between the plaintiffs and Ford the plaintiffs had received orders from Ford to pay the following sums out of the moneys realized by the sale, which sums the plaintiffs did pay after the sale:—

	£	s.	d.
Manchester and Liverpool Bank . .	500	0	0
Rent	224	19	8
Hothersall, Preston	32	10	0
Farmers' Auction Co., Penrith . .	107	2	0
	£864	11	8

The plaintiffs' commission and charges in respect of the sale amounted to 32*l.* 13*s.* Ford owed the plaintiffs in respect of money lent, money paid, and services rendered sums amounting in all to 62*l.* 11*s.* 6*d.* Excluding the amount of the defendant's purchases the plaintiffs received sufficient money to satisfy their lien, but not sufficient to pay Ford's creditors or their own debt; but including the amount of these purchases the sale realized sufficient to satisfy all claims, leaving a surplus of 27*l.* 6*s.* 4*d.*

The position as between Ford and the defendant was that Ford owed the defendant 164*l.* 4*s.*, and the defendant had upon the faith of his arrangement with Ford bought cattle at the sale at prices amounting to 195*l.*

Under these circumstances the plaintiffs requested the defendant to pay to them the purchase price of the cattle he had bought; but the defendant refused, alleging that he was entitled to rely upon his agreement with Ford as to a set-off. The defendant before action tendered the difference between the 164*l.* 4*s.* and the 195*l.*, and subsequently paid that amount to the plaintiffs.

Abel Thomas, K.C., and *Trevor Lloyd*, for the plaintiffs. There is no answer to the plaintiffs' claim to the balance of 164*l.* 4*s.* An auctioneer has not only possession of but a special property in the goods delivered to him for sale. He makes the contract of sale and is the proper person to sue upon that contract for the purchase-money: *Williams* v. *Millington* (1); *Woolfe* v. *Horne*. (2)

(1) (1788) 1 H. Bl. 81. (2) (1877) 2 Q. B. D. 355.

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Payment to the owner of the goods is no defence to an action by an auctioneer for the price of the goods he sells: *Robinson* v. *Rutter* (1); nor could a sum due from the owner of the goods to the purchaser be set off against the claim of the auctioneer: *Isberg* v. *Boden*. (2)

R. V. Bankes, K.C., and *R. M. Montgomery*, for the defendant. After his claim for his charges is satisfied, as it was in this case, an auctioneer sells the goods and holds the proceeds of the sale merely as trustee or agent for the owner, and the liabilities of a purchaser are affected by the state of accounts between him and the owner: *Holmes* v. *Tutton*. (3) When the auctioneer's lien has been satisfied an agreement, such as there was in the present case, between the owner of the goods and the purchaser at the auction that the price of the goods shall be set off against a debt due from the owner to the purchaser is a valid agreement, and a defence to an action by the auctioneer: *Grice* v. *Kenrick*. (4) The agreement could be pleaded as an equitable set-off: *Cochrane* v. *Green*. (5)

Abel Thomas, K.C., in reply. In the present case the rights and interest of the plaintiffs in the goods and proceeds of sale were not exhausted when their lien for their charges was satisfied. They were still bound, as between themselves, Ford, and Ford's creditors, to pay those creditors out of the proceeds of the sale. That fact distinguishes this case from *Holmes* v. *Tutton* (3) and *Grice* v. *Kenrick*. (4) The amount of interest which an auctioneer has in the goods to be sold and in the proceeds of the sale depends upon the arrangement between him and the owner of the goods. After having invested the auctioneer with a certain interest the owner cannot by subsequent arrangement with a purchaser devest the auctioneer without his assent.

Cur. adv. vult.

April 1. BANKES J. delivered a written judgment which, after stating the facts as above, proceeded as follows:—

The question which I have to decide is whether the defendant is entitled to set up his arrangement with Ford as an answer to

(1) (1855) 4 E. & B. 954.
(2) (1853) 8 Ex. 852.
(3) (1855) 5 E. & B. 65.
(4) (1870) L. R. 5 Q. B. 340.
(5) (1860) 9 C. B. (N.S.) 448.

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the whole of the plaintiffs' claim, or to any and if so what part of it. It is, I think, well settled that an auctioneer has, as regards goods entrusted to him for sale, not only a possession coupled with an interest and a lien for his charges, but also a special property which entitles him to sue for the price of the goods which he sells: see *Williams* v. *Millington* (1); *Woolfe* v. *Horne*. (2) In *Robinson* v. *Rutter* (3) Lord Campbell C.J. likens the position of an auctioneer to that of a factor who sells goods having advanced money on them. A purchaser of goods at an auction would have had under the old system no right at law to set off against the claim of the auctioneer for the price of the goods any debt due to the purchaser from the owner of the goods: *Isberg* v. *Boden*. (4) But if the claim was by the owner the set-off would be good: see *Bartlett* v. *Purnell*. (5) A purchaser has nevertheless a right in equity by way of equitable defence to rely upon any set-off which he can establish as against the owner of the goods: see *Holmes* v. *Tutton* (6); *Grice* v. *Kenrick*. (7)

It was contended for the defendant that the effect of these decisions is that when once the lien of the auctioneer is satisfied any set-off which would be a good set-off as against any claim by the owner for the price of the goods must be a good answer to any claim by the auctioneer for the same price. I do not agree with this contention. In *Cochrane* v. *Green* (8) Williams J. thus lays down the rule with regard to an equitable set-off. He says: "I apprehend the established rule of equity with reference to set-off is, to look upon the beneficial owner as the real owner, and by injunction to compel other Courts to regard his rights, and to disregard the legal title of the trustee." It is to this principle I think that Lord Campbell C.J. is referring when in *Holmes* v. *Tutton* (6) he speaks of the auctioneer, after his lien is satisfied, suing merely for his principal. In *Grice* v. *Kenrick* (7) the only claim of the auctioneer was for his charges which would be covered by his lien. In *Holmes* v. *Tutton* (6) the auctioneer

(1) 1 H. Bl. 81.
(2) 2 Q. B. D. 355.
(3) 4 E. & B. 954.
(4) 8 Ex. 852.
(5) (1836) 4 Ad. & E. 792.
(6) 5 E. & B. 65.
(7) L. R. 5 Q. B. 340.
(8) 9 C. B. (N.S.) 448, at p. 468. See, however, *Middleton* v. *Pollock* (1875) L. R. 20 Eq. 29.

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had other claims upon the proceeds of the sale beyond those covered by his lien, but the decision rested upon other grounds, and I do not read either of these decisions as an authority for the proposition put forward by the defendant. If an arrangement between the owner of goods and a purchaser of the goods at an auction either that the purchaser of the goods shall have them without payment, or shall be entitled to set off a previously existing debt, is not sufficient, if not communicated to the auctioneer, to defeat the auctioneer's claim for his charges, I fail to see any principle upon which such an arrangement can defeat a previous agreement between the owner of the goods and the auctioneer as to the disposition of the proceeds of the sale on the faith of which agreement the auctioneer has acted. In my opinion the equitable defence set up by the defendant does not avail him, except as to any portion of the moneys claimed which, if recovered by the plaintiffs, they would be bound to hand over to Ford. Upon the facts as I find them I do not consider that the plaintiffs could be bound to hand over to Ford more than 27*l.* 6*s.* 4*d.*, and to this extent only I consider that the defence is good. I therefore give judgment for the plaintiffs for 136*l.* 17*s.* 8*d.*, being the amount claimed less 30*l.* 16*s.* already paid, and the said sum of 27*l.* 6*s.* 4*d.*, with the costs of the action. If there are any separate costs of establishing the defendant's right to set off the sum of 27*l.* 6*s.* 4*d.* the defendant is to have those costs.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Flux, Leadbitter & Co., for H. W. G. Garnett, Crewe.*

Solicitors for defendant: *Gibson & Weldon, for H. P. Rigby, Middlewich.*

W. H. G.

GUARDIANS OF ST. MATTHEW'S, BETHNAL GREEN, APPELLANTS *v.* GUARDIANS OF PADDINGTON, RESPONDENTS.

1912
April 24.

Poor Law—Pauper—Settlement—Deserted Wife -Acquisition of Settlement by Residence—Poor Removal Act, 1861 (24 & 25 *Vict. c.* 55), *s.* 3—*Divided Parishes and Poor Law Amendment Act*, 1876 (39 & 40 *Vict. c.* 61), *ss.* 34, 35.

A deserted wife can, under s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876, acquire a settlement by residence in a parish for three years in such manner and in such circumstances in each of those years as would render her irremovable therefrom.

CASE stated by quarter sessions.

The Paddington guardians appealed at the quarter sessions for the county of London against an order of a metropolitan police magistrate, made upon the complaint of the guardians of St. Matthew, Bethnal Green, adjudging the last legal settlement of Hetty Gosling, a pauper aged 41, to be in the parish of Paddington.

The pauper was the lawful wife of Arthur Gosling, to whom she was married in 1895, and it was admitted that the parish of the last legal settlement of Arthur Gosling was Portslade-by-Sea, in the Steyning Union, and that such settlement was acquired by him by renting and rating in respect of a tenement from June, 1907, to August, 1908.

The pauper was deserted by her husband in 1897, and since then had been a deserted married woman within the meaning of s. 3 of the Poor Removal Act, 1861 (24 & 25 Vict. c. 55).

Since the desertion by her husband the pauper resided in the parish of Paddington for three years and upwards, from 1902 to 1907, in such manner and under such circumstances in each of such three years as would in accordance with s. 3 (1)

(1) 24 & 25 Vict. c. 55, s. 3: "Where a married woman shall have been or shall be deserted by her husband, and shall after his desertion reside for [one year] in such a manner as would, if she were a widow, render her exempt from removal, she shall not be liable to be removed from the parish wherein she shall be resident, unless her

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of the Poor Removal Act, 1861, as amended by s. 17 of the Poor Law Amendment Act, 1866 (29 & 30 Vict. c. 113), render her irremovable therefrom.

It was contended on behalf of the respondents that a married woman though deserted cannot obtain a settlement apart from her husband, and that the pauper took the same settlement as that of her husband, namely, Portslade-by-Sea, and that the order was wrongly made.

It was contended on behalf of the appellants that the pauper by reason of the above facts had acquired a settlement of her own by residence and must be deemed to be settled in the parish of Paddington in accordance with the provisions of s. 34 (1) of the Divided Parishes Act, 1876 (39 & 40 Vict. c. 61).

The Court of quarter sessions upheld the contention of the respondents and quashed the order.

The question for the opinion of the Court was whether the last legal settlement of the pauper was in the parish of Paddington or not.

Macmorran, K.C., and *W. L. L. Bell*, for the appellants. The pauper, upon these facts, became irremovable from the parish of Paddington by reason of the provisions of s. 3 of the Poor Removal Act, 1861. Then s. 34 of the Divided Parishes Act,

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husband return to cohabit with her."

(1) 39 & 40 Vict. c. 61, s. 34: "Where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise; provided that an order of removal in respect of a settlement acquired under this section shall not be made upon the evidence of the person to be removed, without such corroboration as the justices or Court think sufficient."

Sect. 35: "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another."

1876, provides that, where "any person" has so resided in a parish for three years as to be irremovable, he acquires a settlement therein. The sole question, therefore, is whether a deserted wife can so acquire a settlement in her own right. In *Reg.* v. *Maidstone Union* (1) Manisty J. said: 'I think that we ought not to put too narrow a construction on 24 & 25 Vict. c. 55, s. 3, and that it must be taken to mean that, where a woman is, whether rightfully or wrongfully, sent away by her husband so as to be left as a free woman, she can so reside as to gain a settlement apart from him." That is a direct decision that a married woman deserted by her husband can acquire a settlement in her own right; and it was approved of by Vaughan Williams and Fletcher Moulton L.JJ. in *Southwark Union* v. *City of London Union.* (2) In *West Ham Union* v. *Holbeach Union* (3) the question under ss. 34 and 35 was with regard to the acquisition of a settlement by a child under sixteen. The argument there was that "person," in s. 34, means only a person sui juris, and Lord Halsbury L.C. said: "If it were res integra I might be inclined to favour the view which Mr. Lush has urged upon us with so much ability. Indeed I am not sure that I would not go further than he does and strive to bring back the meaning of the word 'settlement' to the meaning it had when Bott and Lord Kenyon were its expositors; but the statute which has turned a 'status of irremovability' into a settlement has rendered such an effort impossible"; and the opinion of Lord Loreburn L.C. in *Fulham Parish* v. *Woolwich Union* (4) is to the same effect. From those cases it is clear that the word "person" in s. 34 includes a deserted wife. The Court of quarter sessions was influenced in its decision by the Scottish case of *Rutherglen Parish Council* v. *Glasgow Parish Council* (5), where it was held that a deserted wife could not acquire a settlement different from that of her husband; but in Scotland there is no statute similar to s. 3 of the Poor Removal Act, 1861, giving a status of irremovability to a deserted wife. That case,

(1) (1879) 5 Q. B. D. 31.
(2) [1906] 2 K. B. 112, 117.
(3) [1905] A. C. 450, 451.
(4) [1907] A. C. 255, 259.
(5) [1902] A. C. 360.

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therefore, is not an authority in regard to English law; the English statutes and *Reg.* v. *Maidstone Union* (1) were not cited.

It is contended that s. 35 of the Act of 1876 constitutes an exception from s. 34 in the case of a married woman; but it has been settled by the decisions in the House of Lords that it does not: *Fulham Parish* v. *Woolwich Union* (2) and *West Ham Union* v. *Woolwich Union* (3); *Kingston-upon-Hull Incorporation for the Poor* v. *Hackney Union.* (4) Those cases shew that the word "person," in s. 34 of the Act of 1876, is a word of general application which is not qualified by s. 35, and accordingly it applies to a deserted wife who has acquired a status of irremovability under s. 3 of the Act of 1861.

J. F. P. Rawlinson, K.C., and *Herbert Davey*, for the respondents. The provisions of s. 35 of the Act of 1876 qualify the provisions of s. 34 as to any person who is incapable of acquiring a settlement, such as a married woman. The effect of that qualification is that the word "person," in s. 34, means any person capable of acquiring a settlement. A wife is incapable of acquiring a settlement for herself because she always has a settlement derived from her husband. No case has occurred since 1876 in which a married woman has been declared to have acquired a settlement. The decision in the case of *Reg.* v. *Maidstone Union* (1) was only that the deserted wife had acquired the status of irremovability. There is an obvious slip in the report of the judgment of Manisty J. in the *Law Reports* (5) in using the word "settlement"; in the report in the *Law Journal* (6) the word "settlement" does not appear, the expression being "exempt from removal." That case, therefore, is no authority at all upon a question of settlement. The cases in the House of Lords which have been cited all related to children, and in none of them was it even suggested that a married woman could acquire a settlement of her own. The word "person" was used in all the statutes relating to the settlement of paupers, and has always meant a

(1) 5 Q. B. D. 31.
(2) [1907] A. C. 255, 259.
(3) [1905] A. C. 450.
(4) [1911] 1 K. B. 748, 768.
(5) 5 Q. B. D. at p. 34.
(6) 49 L. J. (M.C.) 25, 27.

person capable of acquiring a settlement; the Act of 1876 has not made any difference in that respect: *Medway Union* v. *Bedminster Union*. (1)

In the cases relating to children the whole question was whether there was any inherent disability in children to acquire a settlement, and it was held that there was not; if there had been, those cases would have been decided differently. In the case of a wife there is an inherent incapacity to acquire a settlement of her own. Sect. 35 of the Act of 1876 was enacted in order to abolish derivative settlements, and therefore it was necessary in that section to except the case of a wife.

The Scottish case—*Rutherglen Parish Council* v. *Glasgow Parish Council* (2)—is an absolute authority upon the construction of s. 34 and determines this case. There is no difference between the laws of Scotland and of England in this respect, except that the law of Scotland is simpler than that of England. Sect. 1 of the Scottish Act (3) is practically word for word the same as s. 34 of the Act of 1876, and it was decided that the words "any person" did not include a deserted wife.

Macmorran, K.C., was not heard in reply.

Lord Alverstone C.J. I shall never feel any confidence in deciding a pauper settlement case, but I have done my best to follow the arguments upon which Mr. Rawlinson contends that the order adjudging this pauper to have a settlement in Paddington was wrong.

It seems to me that we must be very careful in deciding this case to appreciate the position which has been settled by the House of Lords with regard to irremovability and its bearing upon settlement. It is not seriously contested that the House of Lords have laid down or applied a rule which it would be very difficult to apply if they had founded it upon some of the earlier cases. I said that in my judgment in *Kingston-upon-Hull Incorporation for the Poor* v. *Hackney Union* (4), which has been affirmed by the Court of Appeal, and I see no reason to alter what I said on that occasion.

(1) (1889) 14 App. Cas. 465.
(2) [1902] A. C. 360.
(3) 61 & 62 Vict. c. 21.
(4) [1911] 1 K. B. 748.

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In this case the facts are very simple. The pauper was married in 1895 and was deserted by her husband in 1897. Since then she has been a deserted married woman, and from 1902 to 1907 she resided in the parish of Paddington in such manner and in such circumstances in each of the necessary three years as would, in accordance with s. 3 of the Act of 1861, render her irremovable therefrom. It is contended by the appellants that the result of that state of facts is that, by reason of the two statutes to which I shall have to call attention, she has acquired a settlement in Paddington. The stipendiary magistrate took that view and made an order accordingly; but the Court of quarter sessions took the contrary view and reversed that order.

I think that we must deal with this case by first considering carefully the statutes before we consider the authority upon which the respondents mainly rely, that is, the Scottish case of *Rutherglen Parish Council* v. *Glasgow Parish Council.* (1) I do not know whether s. 3 of the Act of 1861 enacted new law in whole or in part, but as far as I remember it was very nearly if not entirely new. [His Lordship read s. 3 as amended by s. 17 of the Act of 1866.] That, of course, is not by itself sufficient for the appellants, for the pauper was found in Bethnal Green and the question is not as to her removal from Paddington. That was a question which I have had to consider in some cases, and possibly I did not at first appreciate what might be the effect of irremovability. I thought that there was such a clear distinction between irremovability and settlement that the two questions might almost be considered independently of one another.

Now, it is not disputed that, if the pauper had been in Paddington, she would have been irremovable therefrom. That is the result of the Act of 1861. Then came the Divided Parishes Act of 1876, and the language of s. 34 of that Act is clearly wide enough to cover this case unless it is to be cut down, as the respondents contend, so as not to include a married woman because s. 35 shews that she is not within s. 34. The words of s. 34 are: [His Lordship read the section.] Mr. Rawlinson does not dispute that the language is wide enough to include a married woman, but he contends that a married woman is not a "person"

(1) [1902] A. C. 360.

within the section because she has the settlement of her husband and cannot have any other. That is a forcible argument, but it seems to me that it is answered by the reasoning of those cases which undoubtedly shew that some other persons, who in ordinary circumstances had derivative settlements, could acquire a settlement of their own.

Then s. 35 provides: [His Lordship read the first part of the section.] The respondents contend that that clearly cuts down the operation of s. 34. I cannot see that it does so. Sect. 34 does not deal with derivative settlements at all, but with the case in which a person has become irremovable by residence for three years, and provides that in such a case he shall be deemed to have acquired a settlement in the place in which he so resided. Then, s. 35 seems to me to be an alteration of the law with regard to derivative settlements. It says that no person shall be deemed to have derived a settlement "except in the case of a wife from her husband and in the case of a child under the age of sixteen," &c. It is because of the inclusion in that section of that second class of persons who are allowed to have derivative settlements that the authority of the cases in the House of Lords shews that a wife deserted by her husband can come within s. 34. I do not propose to go through those cases, but I understand them to decide that a child who can have a derivative settlement under s. 35 can also acquire a settlement for itself under s. 34; and I cannot see any reason why, if a child which may have a derivative settlement under s. 35 can also acquire a settlement for itself, a married woman who has a derivative settlement cannot also acquire one for herself. Mr. Rawlinson contends that the reason is that a married woman has an inherent incapacity to acquire a settlement of her own; but ordinarily a child has the same inherent incapacity. I think, therefore, that we must now recognize that there is no distinction between the case of a deserted wife and that of a child. Under s. 3 of the Act of 1861 the deserted wife became irremovable, and s. 34 of the Act of 1876 says that "any person" who so becomes irremovable for three years is deemed to have acquired a settlement; and there is no reason why "any person" should not include a deserted wife.

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It is contended that this view is contrary to the decision in *Rutherglen Parish Council* v. *Glasgow Parish Council.* (1) In that case certain assumptions were made with regard to the law of England by Lords Lindley and Brampton, but neither the Acts of 1861 and 1876 nor the decisions upon those Acts were brought to the notice of the House of Lords in that case; and it seems that in Scotland there is no statute similar to the Act of 1861. I think therefore that, in view of the recent decisions of the House of Lords in the English cases, we should be wrong in holding that the Scottish case has decided that in England a married woman cannot acquire a settlement of her own under the English statutes. I express my opinion with diffidence, but I have come to a clear conclusion that we cannot, having regard to the principle of the decisions of the House of Lords, come to any other conclusion than that a deserted wife who has become irremovable for three years under s. 3 of the Act of 1861 acquires a settlement of her own under s. 34 of the Act of 1876.

This appeal must therefore be allowed and the order of the stipendiary magistrate restored.

PICKFORD J. I agree. The question before us is whether a married woman deserted by her husband can acquire a settlement by the joint operation of s. 3 of the Poor Removal Act, 1861, and s. 34 of the Divided Parishes Act, 1876.

I think that that question is determined not by the absolute decisions, because the point was not decided, but by the principle of the decisions in the recent cases in the House of Lords which were discussed in this Court and the Court of Appeal as recently as in the case of *Kingston-upon-Hull Incorporation for the Poor* v. *Hackney Union.* (2) Those cases decided that the fact that the person, in that case an unemancipated child, might have a derivative settlement under some circumstances under s. 35 of the Act of 1876 did not prevent him from acquiring a settlement under s. 34 of the Act. Sect. 34 provides, broadly, that where persons have been resident so as to be irremovable for three years in any place they shall be deemed to be settled in that place; and s. 35, after abolishing other derivative settlements,

(1) [1902] A. C. 360. (2) [1911] 1 K. B. 748.

preserves derivative settlements in the case of a wife and in the case of an unemancipated child. The House of Lords has decided that, although the derivative settlement of the unemancipated child is preserved by s. 35, nevertheless that child can acquire a settlement by virtue of the provisions of s. 34; and that reasoning would seem to apply equally to the wife. It is contended that it does not apply because an unemancipated child was capable of acquiring a settlement, whereas a married woman was wholly incapable of acquiring a settlement for herself, and that, therefore, the words "any person" in s. 34 must be read as excluding a married woman. Now, if there were no provisions such as those of the Act of 1861, that contention would seem to be sound; but it seems to me to ignore the provisions of the Act of 1861 coupled with s. 34 of the Act of 1876, because there is a special provision in s. 3 of the Act of 1861 that a married woman who has been deserted can acquire a status of irremovability by residence in accordance with that section. If not deserted, I do not think she could acquire a status of irremovability apart from her husband at all, but that provision expressly gives her the power, if deserted, of acquiring a status of irremovability. She was, therefore, a person who could in her own right, so to speak, acquire a status of irremovability at the date of the passing of s. 34 of the Act of 1876, and that section provides that any person who has resided so as to be irremovable for three years shall be deemed to be settled, and I think that must be taken as contemplating the case of a deserted wife, because she had been expressly given the power of acquiring a status of irremovability. I think, therefore, that the argument of Mr. Rawlinson, which may be perfectly correct in the case of an undeserted married woman, does not apply to a deserted wife who by virtue of the earlier statutes has the power of acquiring the status of irremovability. I think, therefore, that this case comes within the principle of the decisions of the House of Lords that although s. 35 preserves derivative settlements in the case of a married woman and an unemancipated child, it does not prevent the operation of s. 34 where those persons are given the power of acquiring a status of irremovability. I agree, therefore, that this appeal must be allowed.

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AVORY J. I am of the same opinion. I think a great deal of the difficulty in this case has arisen from the efforts which have been made to construe s. 35 of the Act of 1876 as if it were an exception to the provisions of s. 34, whereas the true view, as explained by the more recent decisions of the House of Lords, is that the two sections are to be read separately. Sect. 34 deals with the question of settlements and the way in which they can be acquired by residence, and s. 35 deals with the question of derivative settlements with the object of abolishing them, so far as possible, with certain exceptions.

Now I am satisfied that this question of the deserted wife has never been before the House of Lords up to the present time. It is quite true that there are expressions in the judgments in *Medway Union* v. *Bedminster Union* (1) which go a long way to support Mr. Rawlinson's argument; for instance, I find that Lord Watson, dealing with the case of the widow, said: "During the subsistence of her derivative settlement I do not think the widow had the capacity to acquire by residence another settlement of the same quality and in the same parish." Lord Macnaghten approved also of the view of Lopes L.J. in the same case, and held that she retained her derivative settlement and had not acquired another. But it appears, on looking at the judgment of Lopes L.J. in the Court of Appeal (2), that he clearly had not in his mind any such case as the present one, because he says, speaking of the wife: "It is not the residence of the wife which renders her irremovable, it is the residence of the husband. During his life she cannot, I think, do anything to acquire a status of irremovability in her own right, or a settlement, but her status and settlement follow and change with his." Now it is obvious that that cannot be true with regard to the deserted wife, because the statute of 1861 distinctly confers upon her the right to acquire a status of irremovability. The only other decision which is said to conflict with the view which has already been expressed by my Lord and my brother Pickford is the decision in the Scottish case (3), and there again I find that not only was this case of the deserted wife, according to the English law, not

(1) 14 App. Cas. 465, 487. (2) (1888) 21 Q. B. D. 278, 283.
(3) [1902] A. C. 360.

present to the mind of the House at all, but that Lord Halsbury L.C. says this (1): "It is true enough the statute enacts"—that is the Scottish statute—"that a destitute deserted wife may be relieved under the poor law as though she were a widow, but no Act has provided that she may acquire a settlement in her own right if she is deserted." Here, if the view which I have expressed about s. 34 is correct, the statute of 1861, which enables her to acquire a status of irremovability, must also, I think, by incorporation with s. 34 of the Act of 1876, enable her to acquire a settlement by the three years' residence in circumstances which give her a status of irremovability. For these reasons I agree that the pauper was in this case settled in Paddington.

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Appeal dismissed.

Solicitors for appellants: *Alfred Double & Sons.*
Solicitors for respondents: *Collins & Co.*

J. H. W.

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Landlord and Tenant—Distress—Purchase by Landlord of Goods distrained—Subsequent User of Goods by Landlord—Conversion—Distress for Rent Act, 1737 (11 *Geo.* 2, *c.* 19), *s.* 19.

By s. 19 of the Distress for Rent Act, 1737, "where any distress shall be made for any kind of rent justly due, and any irregularity or unlawful act shall be afterwards done by the party or parties distraining, or by his, her, or their agents, the distress itself shall not be therefore deemed to be unlawful, nor the party or parties making it be deemed a trespasser or trespassers ab initio; but the party or parties aggrieved by such unlawful act or irregularity shall or may recover full satisfaction for the special damage he, she, or they shall have sustained thereby, and no more, in an action of trespass or on the case, at the election of the plaintiff or plaintiffs."

The defendants, who were the owners of a seam of coal, let it to a tenant with the right to work and get the coal on payment of a royalty for each ton of coal worked, and there was a power of distress if the royalties were unpaid. Subsequently the lessee sold to the plaintiffs

(1) [1902] A. C. at p. 364.

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the right to get the coal under the lease held by him on payment to him of all such sums as should become due in respect of the royalties. After the plaintiffs had taken possession the royalties payable by the lessee to the defendants fell into arrear, and the defendants distrained certain ponies, the property of the plaintiffs, and certain wagons which the plaintiffs had hired from a wagon company. The defendants had the ponies and wagons appraised and purported to buy them for themselves at the appraised value, and they then worked the ponies for their own purposes, and delivered up the wagons to the wagon company on demand, though no sum was due for the hire of the wagons. In an action by the plaintiffs for conversion of the ponies and wagons, the sale to the defendants being invalid (*Moore, Nettlefold & Co.* v. *Singer Manufacturing Co.* [1904] 1 K. B. 830), the defendants contended that by reason of s. 19 of the Distress for Rent Act, 1737, they were not liable for conversion, but only for the special damage sustained by the plaintiffs :—

Held, that, as the acts complained of were not done by the defendants in their capacity of distrainors nor in the course of the distress, but in their supposed capacity as owners of the goods by purchase and after the completion of the distress, s. 19 did not apply, and the defendants were liable for conversion.

APPEAL from the county court of Monmouthshire holden at Pontypool.

The action was brought in the High Court to recover damages for the wrongful detention and conversion of certain colliery wagons and pit ponies, and was remitted for trial to the county court under s. 66 of the County Courts Act, 1888.

The defendants, who were the owners of a seam of coal, by an agreement in writing dated November 17, 1902, let it to one Jenkins from January 1, 1901, as tenant from year to year, and the latter agreed to work the coal on payment to the defendants of 10*d.* for every ton of coal worked, such payment to be made quarterly; and the agreement provided that if the royalty thereby reserved should be unpaid for thirty days after any of the quarter days, whether the same should have been demanded or not, the defendants might enter upon the premises and distrain.

By an agreement dated June 30, 1908, Jenkins agreed to sell to the plaintiffs (inter alia) the right to get coal under the lease held by him on payment to him of all such sums of money as should become due in respect of royalties.

The plaintiffs worked the coal, and for that purpose they hired from the North Central Wagon Company two colliery wagons. By the agreement of hire, which was dated April 7, 1909, the

plaintiffs hired the wagons for three years and nine and a half months from January 1, 1909, at a yearly rent of 8*l.* 6*s.* 1*d.* for each wagon, payable quarterly on March 31, June 30, September 30, and December 31 in each year; and upon the due completion of the agreement the plaintiffs were to have the option of purchasing the wagons at the price of 1*s.* each.

Upon August 24, 1910, the royalties due from Jenkins to the defendants being in arrear, the defendants levied a distress upon the premises and seized, among other things, the two wagons above mentioned and five pit ponies which were the property of the plaintiffs. At this date the plaintiffs were not in arrear with the rent payable in respect of the wagons. The defendants had the wagons and ponies appraised, and, as the county court judge found, "they themselves bought them, or purported to buy them, at the appraised value," namely, 45*l.* for the five ponies and 40*l.* for the two wagons, crediting Jenkins' account with the amounts. The North Central Wagon Company thereupon demanded the delivery up of the wagons to them, and the defendants at once delivered them up. The defendants retained and worked the ponies for their own purposes.

The county court judge came to the conclusion that, as the purported sale to the defendants did not pass the property in the goods to them,—*King* v. *England* (1) and *Moore, Nettlefold & Co.* v. *Singer Manufacturing Co.* (2)—their act in working the ponies for their own purposes amounted to a conversion of them, and he awarded the plaintiffs 45*l.* in respect thereof, but that in the circumstances there was no conversion of the wagons; and he gave judgment for the plaintiffs for 45*l.*, the value of the ponies. The plaintiffs appealed against so much of the judgment as related to the wagons, and the defendants gave cross-notice of appeal against so much of the judgment as related to the ponies.

Sanderson, K.C., and *Bertram Jacobs*, for the plaintiffs. It is admitted that the distress was originally lawful, as rent was in arrear from Jenkins. But the defendants had no power to sell the goods taken under the distress to themselves: *King* v.

(1) (1864) 4 B. & S. 782. (2) [1904] 1 K. B. 820.

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England (1); *Moore, Nettlefold & Co.* v. *Singer Manufacturing Co.* (2) The sale was invalid and did not pass the property in the goods to the defendants. The defendants therefore had no right to work the ponies or to deliver up the wagons to the North Central Wagon Company, and in doing so they were guilty of conversion, and the plaintiffs are entitled to recover the full value of the wagons as well as of the ponies: *The Winkfield.* (3) The county court judge ought therefore to have awarded the plaintiffs 40*l.*, the admitted value of the wagons, as well as the 45*l.*, the value of the ponies.

Lincoln Reed, for the defendants. A right of possession and a right of property are necessary to support an action for conversion: *Gordon* v. *Harper.* (4) The plaintiffs had no right to the possession of the ponies or wagons which had been seized under the distress. But however that may be, at common law before the Distress for Rent Act, 1737, though the distress was lawfully put in, an irregularity or unlawful act committed by the person distraining afterwards rendered the distress unlawful and the person distraining a trespasser ab initio. In order to remedy that state of the law s. 19 of the Distress for Rent Act, 1737 (5), provides that

(1) 4 B. & S. 782.
(2) [1904] 1 K. B. 820.
(3) [1902] P. 42.
(4) (1796) 7 T. R. 9.
(5) 11 Geo. 2, c. 19, s. 19: "And whereas it hath sometimes happened that upon a distress made for rent justly due the directions of the statute"—2 W. & M. sess. 1, c. 5—"have not been strictly pursued, but through the mistake or inadvertency of the landlord or other person entitled to such rent and distraining for the same, or of the bailiff or agent of such landlord or other person, some irregularity or tortious act hath been afterwards done in the disposition of the distress so seized or taken as aforesaid, for which irregularity or tortious act the party distraining hath been deemed a trespasser ab initio, and in an action brought against him as such the plaintiff hath been entitled to recover, and has actually recovered, the full value of the rent for which such distress was taken: And whereas it is a very great hardship upon landlords and other persons entitled to rents that a distress duly made should be thus in effect avoided for any subsequent irregularity: Be it enacted by the authority aforesaid that . . . . where any distress shall be made for any kind of rent justly due, and any irregularity or unlawful act shall be afterwards done by the party or parties distraining, or by his, her, or their agents, the distress itself shall not be therefore deemed to be unlawful, nor the party or parties making it be deemed a trespasser or trespassers ab initio; but the party or parties

in such a case the distress shall not be deemed to be unlawful, nor the party making it a trespasser ab initio, but the person aggrieved may recover full satisfaction for the special damage sustained, and no more. The distress being lawful in its inception, since that enactment no subsequent act of the landlord in dealing with the distrained goods will make him liable for conversion. The acts of the defendants being mere irregularities or unlawful acts, the section protects them from an action for conversion in respect of their dealing with the goods. *King* v. *England* (1) and *Moore, Nettlefold & Co.* v. *Singer Manufacturing Co.* (2) only decide that a landlord cannot sell the distrained goods to himself, and that therefore neither the landlord nor an assignee from him can acquire a title to the goods in such a case. In those cases the landlord was not sued for conversion, and they do not decide that a landlord in the case of such a sale and a subsequent dealing with the goods is not within the protection of s. 19 of the Act of 1737. That section was passed for the protection of landlords only, and an assignee from the landlord, who has acquired no title to the goods, is not within the protection of the Act, and may be liable to the true owner in detinue or trover. The plaintiffs, therefore, were not entitled to sue for conversion, but only for the special damage which they may have sustained: *Wallace* v. *King* (3); *Avenell* v. *Croker*. (4) The purchase by the defendants was a nullity and may be treated as non-existent, and accordingly the acts of the defendants which are complained of were committed by them in their character as distrainors and in the course of the distress and come within the protection of s. 19 of the Act of 1737. The defendants, therefore, were not liable for conversion either in respect of the ponies or of the wagons. (5)

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aggrieved by such unlawful act or irregularity shall or may recover full satisfaction for the special damage he, she, or they shall have sustained thereby, and no more, in an action of trespass or on the case, at the election of the plaintiff or plaintiffs. . . ."

(1) 4 B. & S. 782.

(2) [1904] 1 K. B. 820.

(3) (1788) 1 H. Bl. 13.

(4) (1828) Moo. & M. 172.

(5) A point was raised that, even if the defendants were guilty of conversion of the wagons, inasmuch as the plaintiffs were merely bailees

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[HAMILTON J. referred to *Armory* v. *Delamirie* (1) and *Cooper* v. *Willomatt.* (2)]

Sanderson, K.C., was not called upon to reply.

HAMILTON J. This is an appeal by the plaintiffs against so much of the judgment of the county court judge as refused to give them damages in respect of two colliery wagons which, as they alleged, had been converted by the defendants, and there is a cross-appeal by the defendants against so much of the judgment as awarded damages to the plaintiffs in respect of the conversion of five pit ponies.

The facts are these. The North Central Wagon Company were the owners of the wagons, and they had let them to the plaintiffs under a hiring agreement for a term of years. The wagons were still so let to the plaintiffs on August 24, 1910, when they were seized under a distress for rent by the defendants. The ponies were the property of the plaintiffs. Jenkins was the lessee from the defendants of the colliery where the wagons and ponies were, and he had in June, 1908, assigned to the plaintiffs the right to get the coal under the lease which he held. Rent in the nature of royalties being in arrear from Jenkins, the defendants distrained for it, and seized the wagons and ponies. The seizure under the distress was admittedly lawful and regular, because Jenkins was in arrear with his rent and the ponies and wagons were on the demised premises. The defendants had the wagons and ponies appraised, and then, as the county court judge has found, "they themselves bought them or purported to buy them at the appraised value." In law the defendants had no power to sell the goods to themselves, and therefore they could only purport so to sell them, and the sale was invalid : *King* v. *England* (3) ; *Moore, Nettlefold & Co.* v. *Singer Manufacturing Co.* (4) After the supposed purchase the defendants worked the ponies for their own purposes, and delivered up the wagons upon

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thereof they were not entitled to recover the full value, but this point was not pressed upon *The Winkfield*, [1902] P. 42, being cited against it.

(1) (1722) 1 Str. 505 ; 1 Sm. L. C., 11th ed., 356.

(2) (1845) 1 C. B. 672.

(3) 4 B. & S. 782.

(4) [1904] 1 K. B. 820.

demand to the North Central Wagon Company. In each case the defendants did an act which was inconsistent with their position as distraining landlords and indicated their intention no longer to behave as such but as owners of the ponies and wagons under the supposed purchase by them. They were therefore prima facie guilty of conversion of the ponies and wagons. Further, it is well-established law that where chattels have been placed in the hands of a bailee for a limited purpose, and he deals with them in a manner wholly inconsistent with the terms of the bailment, and consistent only with his intention to treat them as his own, the right to the possession revests in the owner, who can sue the bailee in trover. Accordingly, though the analogy between a bailee and a distrainor is not perfect, this would apply, unless some substantial distinction can be rested on the rule that a distrainor's possession, if possession it can be called, is the custody of the law and not the separate possession of a bailee, a point which has not been argued. The defendant's contention is that s. 19 of the Distress for Rent Act, 1737, protects the defendants in the present case. That section provides that "where any distress shall be made for any kind of rent justly due, and any irregularity or unlawful act shall be afterwards done by the party or parties distraining, or by his, her, or their agents, the distress itself shall not be therefore deemed to be unlawful, nor the party or parties making it be deemed a trespasser or trespassers ab initio; but the party or parties aggrieved by such unlawful act or irregularity shall or may recover full satisfaction for the special damage he, she, or they shall have sustained thereby, and no more, in an action of trespass or on the case, at the election of the plaintiff or plaintiffs." It is said that the acts of the defendants in the present case were mere irregularities committed by them in the course of the distress, that their position as distraining landlords had not been put an end to, and that therefore they were within the protection of the section, and the plaintiffs were only entitled to recover for the special damage sustained by them. Upon this point I may refer more particularly to the case of *King* v. *England*. (1) In

(1) 4 B. & S. 782.

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Hamilton J.

that case the landlord, having distrained upon goods which the tenant had assigned to the defendant by a bill of sale, had the goods appraised, and instead of selling them took them himself at the appraised price in satisfaction of the rent and charges, and handed them over to the plaintiff. While they were in the plaintiff's possession they were seized by the defendant under the bill of sale. The plaintiff sued the defendant for conversion of the goods, and it was contended on her behalf that s. 19 of the Act of 1737 prevented any irregularity or unlawful act done after the seizure from operating to make the distress illegal, and that the taking of the goods by the landlord at the valuation instead of selling them was no more than an irregularity in respect of which he was liable to an action for any special damage sustained by the party aggrieved. The Court did not accept that contention but held that s. 19 did not dispense with a sale, and that, the landlord having no power to sell to himself, the plaintiff acquired no title to the goods. In my opinion s. 19 is not applicable, and the defendants committed an act of conversion as regards both the wagons and the ponies which gave the plaintiffs the right to sue; and the plaintiffs are entitled to recover the full value of the wagons.

The decision of the county court judge was right as to the ponies, but wrong as to the wagons, there being a conversion in each case. The appeal must therefore be allowed and the cross-appeal dismissed, and judgment must be entered for the plaintiffs for 85*l.* with costs here and below.

LUSH J. I am of the same opinion. It is admitted on behalf of the defendants that if the case does not come within s. 19 of the Distress for Rent Act, 1737, an action of trover lies. Before the passing of that Act a landlord was in this position. If the bailiff or other person who was acting for him in the matter of the distress committed an irregularity or tortious act either at the time of the seizure or in the course of exercising the powers given to a distraining landlord, that irregularity or tortious act rendered the distress unlawful and the landlord a trespasser ab initio, with the result that the landlord was liable in trespass or trover. Sect. 19 of the Act of 1737 was passed to

alter that state of the law, and it provides that where a distress is made for rent due, and any irregularity or unlawful act is afterwards done by the party distraining or by his agent, the distress itself shall not be therefore deemed to be unlawful, nor the party making it a trespasser ab initio; but the party aggrieved by such unlawful act or irregularity may recover full satisfaction for the special damage sustained thereby, and no more, in an action of trespass or on the case. That enactment, in my opinion, applies exclusively to an irregularity or unlawful act committed by the person distraining in carrying out the distress. In other words, if at the time of the seizure or afterwards in exercising the powers conferred upon a distraining landlord an irregularity or unlawful act is committed by him or his agent, the distress shall not be deemed to be unlawful so as to render the landlord a trespasser ab initio, and the tenant is only entitled to recover compensation for the damage he has actually sustained in consequence of the irregularity or unlawful act.

In the present case the acts complained of were not done by the defendants in the course of the distress nor in their capacity as distraining landlords. The defendants, under the impression that they were entitled to purchase the goods, went through the form of a purchase and terminated the distress, and intended to hold the goods from that time, not as distrainors, but as owners by purchase. It may be that when the defendants purported to sell the goods to themselves they were acting in their capacity as distraining landlords. But what they did afterwards—namely, the delivery of the wagons to the North Central Wagon Company and the user of the ponies—were acts done by them, not in their capacity as distraining landlords nor in the course of the distress, but in their supposed capacity as owners of the goods. They were acts done by the defendants outside the distress altogether. Therefore s. 19 of the Act of 1737 does not apply, and the acts were acts of conversion for which the defendants are liable in this action. The county court judge was therefore right with regard to the claim for conversion of the ponies, but he was wrong with regard to the claim for the conversion of the wagons. He ought to have awarded the plaintiffs damages for the

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conversion of the wagons, and the appeal must be allowed and the cross-appeal dismissed.

Appeal allowed and cross-appeal dismissed.

Solicitors for plaintiffs: *Indermaur & Brown, for T. Roberts, Newport (Mon.).*

Solicitors for defendants: *Stow, Preston & Lyttelton, for Coleborne, Coulman & Lawrence, Newport (Mon.).*

W. F. B.

1912
April 26.

GALLOWAY, APPELLANT *v.* SCHILL, SEEBOHM & CO., LIMITED, RESPONDENTS.

Company—Public Company—Annual List and Summary forwarded to Registrar of Companies—Balance-Sheet—Statement of Values of "Fixed Assets"—Sufficiency of Statement—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 26, *sub-s.* 3.

The Companies (Consolidation) Act, 1908, by s. 26, sub-s. 4, requires a public company to forward annually to the Registrar of Companies a "statement . . . . in the form of a balance sheet . . . . containing a summary of its . . . . assets, giving such particulars as will disclose the general nature of those . . . . assets, and how the values of the fixed assets have been arrived at."

The respondents, a public company, forwarded to the registrar a balance-sheet, purporting to be in compliance with s. 26, which, in the statement of assets, set out the following particulars:—"Goodwill, trade marks, machinery, furniture, and fixtures: 100,000*l.* Goodwill and trade marks at the sum at which they were taken over by the company. Machinery, furniture, and fixtures at cost, less depreciation":—

Held, that this balance-sheet did not comply with the requirements of s. 26, sub-s. 4; by Lord Alverstone C.J., because it stated that different parts of the fixed assets had been valued in different ways and did not state the separate values of those parts; by Pickford J., because it ought to state the separate values of the tangible and intangible fixed assets.

CASE stated by the stipendiary magistrate for Manchester.

The appellant, on behalf of the Registrar of Companies, preferred an information against the respondents, a public company registered under the Companies Acts, 1862 to 1893, and having a capital divided into shares, for making default in forwarding to the registrar a copy of the list of members for the year 1911 containing a summary as to its capital, shares, &c., including a

statement, in the form of a balance-sheet, containing a summary of its share capital, its liabilities, and its assets, giving such particulars as would disclose the general nature of those liabilities and assets and how the values of those liabilities had been arrived at, as required by s. 26 of the Companies (Consolidation) Act, 1908.

The respondents, on April 18, 1911, forwarded to the Registrar of Companies an annual list and summary for the year 1911 purporting to be made up in accordance with the requirements of s. 26, but it was not accepted by the registrar and was returned to the respondents on the ground that it did not comply with s. 26, sub-s. 3. (1)

The annual list and summary so forwarded by the respondents contained a statement in the form of a balance-sheet, audited by the company's auditors. On the one side the balance-sheet set out a statement of "capital and liabilities," and on the other side of "assets." The statement of "assets" was as follows: —

	£	s.	d.
Sundry debtors, stock in trade and goods, and other assets abroad .	682,851	16	11
Bills receivable and cash in hand .	16,816	1	2
Goodwill, trade marks, machinery, furniture, and fixtures . . .	100,007	16	5
Buildings, machinery, and fixtures at cost, less depreciation . . .			
Goodwill, trade marks, machinery, furniture, and fixtures . . .			
Goodwill and trade marks at the sum at which they were taken over by the company			
Machinery, furniture, and fixtures at cost, less depreciation . . .			

(1) 8 Edw. 7, c. 69, s. 26, sub-s. 3: "The summary must also (except where the company is a private company) include a statement, made up to such date as may be specified in the statement, in the form of a balance sheet, audited by the company's auditors, and containing a summary of its share capital, its liabilities, and its assets, giving such particulars as will disclose the general nature of those liabilities and assets, and how the values of the fixed assets have been arrived at, but the balance sheet need not include a statement of profit and loss."

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The registrar's objection was that the balance-sheet did not give such particulars as would disclose how the values of the fixed assets were arrived at, in respect that the value of the goodwill was not separately shewn, and that it was not sufficient to place one cumulative value upon all the fixed assets together.

The respondents contended that the balance-sheet gave such particulars as disclosed the general nature of the company's assets and sufficiently shewed how the values of the fixed assets were arrived at; that there was nothing in the words of s. 26, sub-s. 3, to impose the obligation of giving the separate value of each of the fixed assets; and, alternatively, that goodwill was not a "fixed asset" within the meaning of the section.

The stipendiary magistrate held that there was no obligation on the respondents to disclose in the balance-sheet the value of each department of their fixed assets, and that they were only bound to disclose how the values of the fixed assets were arrived at; and that the balance-sheet sufficiently disclosed how those values were arrived at. He accordingly dismissed the information.

Sir J. Simon, S.-G., Sargant, Raeburn, and *L. C. Thomas,* for the appellant. Two points are raised on this appeal. The first is whether goodwill is a "fixed asset" within the meaning of s. 26, sub-s. 3, of the Companies (Consolidation) Act, 1908. "Fixed assets" are not defined by the Act, and it is not an expression which has been discussed in any reported case. It must, it is submitted, bear the same meaning as the well-known expression "fixed capital." In Buckley on Companies, 9th ed., p. 653, it is said: "In some cases the distinction has been conveniently expressed by the use of the terms 'fixed capital' and 'circulating capital.' The capital of a company at any particular moment is represented of course not by the money originally subscribed, but by the property bought with it and owned at that moment by the company. The author would define 'fixed capital' as property acquired and intended for retention and employment with a view to a profit as distinguished from 'circulating capital,' meaning property acquired or produced with a view to sale or re-sale at a profit." Goodwill is clearly fixed capital or a fixed asset in that sense.

The other and main point is whether the balance-sheet which a company is required to include in the summary to be given to the Registrar of Companies ought to shew separately the values of the tangible and intangible assets of the company. The appellant contends that, in order to comply with the requirements of the Act, the balance-sheet must shew separately the values of those two kinds of assets, and that it is not enough to give a general list of all the assets of every kind and then to state one sum as the value of the whole. These provisions are for the purpose of enabling intending shareholders or creditors to judge as to the nature of the assets of a company and the value of the tangible as compared with the intangible assets. The particulars given in the balance-sheet must disclose the "general nature" of the assets and "how the values of the fixed assets have been arrived at." To comply with those requirements a description of each kind of asset must be given, and the method of valuation and value of each kind must be stated. The word used is "values" in the plural, which indicates that separate values must be given. It is useless to give the method of valuation without giving also the value. Here it is stated that two different methods of valuation have been adopted in respect of the two kinds of fixed assets and yet the separate values so ascertained are not stated. The contention of the respondents would defeat the object of the enactment, which is that sufficient information shall be given to prospective shareholders or creditors.

Sir R. Finlay, K.C., *Younger, K.C.*, and *C. Atkinson*, for the respondents. The Legislature has advisedly abstained from enacting what the appellant contends to be the meaning of the section. If the Legislature had intended that the balance-sheet should contain what the appellant contends it ought to contain, it would have been perfectly easy to enact in express terms that the separate value of each kind of asset must be stated. If the appellant's contention is correct, the consequence would be that a company must have a complete valuation of all its fixed assets made every year with a separate value given for each asset. Sect. 26, sub-s. 3, enacts nothing of that kind; it only requires a statement of the general nature of the assets and of the total value of the fixed assets and of the manner in which that value

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has been arrived at. The word "values," in the plural, is used only to indicate that, if different methods of valuation have been applied to different parts of the fixed assets, all those methods must be stated.

It would impose a most onerous burden upon companies to require separate valuations and separate statement of values, and would make companies constantly liable to prosecution by the common informer. The section imposes a penalty, and therefore, if the meaning is doubtful, it must be construed in favour of the company. Sect. 81, which deals with what must be stated in a prospectus, requires (sub-s. 1 (*g*)) that the amount payable for the property acquired by the company must be stated, "specifying the amount (if any) payable for goodwill." That was enacted first in the Companies Act, 1900, and the Legislature, having that precise language before it when enacting s. 26 of this Act, did not adopt it. The Assurance Companies Act, 1909, s. 4, requires every assurance company to deposit a balance-sheet each year giving particulars and values of all its various assets in precise terms; but in this Act, with regard to ordinary companies, it has deliberately abstained from requiring details to be given.

The expression "fixed assets" does not include goodwill and trade marks; trade marks are inseparable from goodwill, for they cannot be assigned except in connection with the goodwill of a business: Trade Marks Act, 1905, s. 22.

Sir J. Simon, S.-G., replied.

LORD ALVERSTONE C.J. I desire to decide nothing except the precise point which has been argued in this case. It is impossible to say whether any other balance-sheet which may come before the Court will or will not comply with the provisions of s. 26, sub-s. 3, of the Companies (Consolidation) Act, 1908, until the nature of the items in the particular balance-sheet is known. In my opinion this balance-sheet is defective because one sum is put down for assets which include goodwill, trade marks, machinery, furniture, and fixtures, not simply because these things have different names, but because upon the face of the balance-sheet it appears that different modes of valuing the different assets included have been applied in arriving at the total figure. It seems

to me that it is not a compliance with the provisions of the section to state in the balance-sheet a total figure—in this case 100,000*l.*—and to say that in arriving at that figure two principles of valuation have been applied without saying also to how much of the total the one and to how much the other principle has been applied. I quite agree with the argument for the respondents that this section is only intended to require a certain amount of information to be given; it is not intended to be inquisitorial or to require a complete balance-sheet with the details frequently found in balance-sheets; it only requires a summary in the form of an audited balance-sheet, which does not, in my opinion, involve anything like the particularity such as is required, for instance, in the case of insurance companies.

That being the general scope of s. 26, sub-s. 3 contains these words, "containing a summary of its share capital, its liabilities, and its assets, giving such particulars as will disclose the general nature of those liabilities and assets." That clearly does not require a detailed statement of the assets with the value of each particular asset, and it seems to me that, if the section had stopped there, this balance-sheet might well be held to be sufficient. But the section goes on, "and how the values of the fixed assets have been arrived at," which is a direction with regard to a particular part of the assets, that is, the "fixed assets." For this purpose I do not think that it is necessary for me to give any precise definition of the meaning of "fixed assets," and I accept the statement expressed by a great authority, Buckley on Companies, which has been quoted. I think that for the purposes of this case "fixed assets" may be taken to mean the same thing as the "fixed capital" employed in the particular year to which the balance-sheet relates.

Now the statute says that information must be given as to how the values of the fixed assets have been arrived at, and it seems to me that it cannot be sufficient to state one total figure for fixed assets with regard to one part of which one mode of arriving at the value has been applied and with regard to the other part of which another mode of valuation has been applied. I think that it is not enough to include machinery, furniture, and fixtures with the other items of goodwill and trade marks in one

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sum, when it is stated that the value of goodwill and trade marks is the sum at which they were taken over by the company and the value of the machinery, furniture, and fixtures is taken "at cost, less depreciation."

I do not wish to lay down any rule as to what a balance-sheet must contain in order to comply with the provisions of the statute, but only to say that I think this balance-sheet is defective. The Solicitor-General has not asked us to make any distinction between goodwill and trade marks, and I express no opinion upon that question, but it seems to me that the balance-sheet must at least enable a shareholder to know to what amount of the fixed assets the one principle of valuation has been applied and to what amount the other has been applied.

For these reasons I think that this balance-sheet is defective, and that the appeal must be allowed and the case remitted to the magistrate.

PICKFORD J. I am of the same opinion. Sub-s. 3 of s. 26 of the Companies (Consolidation) Act, 1908, requires "a statement in the form of a balance sheet . . . . containing a summary of its . . . . assets" to be given to the Registrar of Companies, and if it stopped there it might perhaps be sufficient—I do not decide that—to state what has been stated in this balance-sheet. But the sub-section does not stop there; it goes on: "giving such particulars as will disclose the general nature of those liabilities and assets and how the values of the fixed assets have been arrived at." Now the learned magistrate has held that there is nothing in those provisions to impose upon the company the obligation of disclosing in the balance-sheet the value of each department of the fixed assets, and that the company was only bound to disclose how the values of the fixed assets were arrived at. I think that he has gone wrong in laying down that broad statement. If by that he means, as I think he must mean, that there need not be any division of the assets at all, I think that he is wrong. What may be a "department of the assets" which must be separately valued may be a difficult question in particular cases; but it seems to me that each "department" must be separately valued in the sense that where there are assets of

different kinds in respect of which wholly different considerations may arise in the minds of creditors and persons dealing with the company, those different kinds of assets must be separated. I take this view for a reason which does not appear to have been considered by the learned magistrate, which is, that unless those kinds of assets are separated the balance-sheet will not give "such particulars as will disclose the general nature" of the assets. In my opinion, if one lump sum is stated which includes both tangible and intangible assets, when it may be that 99,000*l.* relate to intangible and only 1000*l.* to tangible assets, then such particulars are not given as disclose the general nature of the assets. Without saying that it is necessary to give an inventory with a valuation of each particular asset, it seems to me that, where persons have to look at these balance-sheets for the purpose of getting information, different considerations apply to different classes of assets, and that separate figures must be given for those different classes of assets, because otherwise there are not particulars which disclose the general nature of the assets.

In my opinion the words which follow, "and how the values of the fixed assets have been arrived at," point in the same direction and shew that the framers of the Act intended that separate values should be given for different kinds of fixed assets.

For these reasons I think that the decision of the magistrate was wrong and that, taking this particular case and using his own expression "department," the department of the assets which consists of goodwill and trade marks should be valued separately, and that that value and the value of that "department" which consists of machinery and fixtures should be stated separately.

AVORY J. I agree.

Appeal allowed.

Solicitor for appellant: *Solicitor to the Board of Trade.*
Solicitors for respondents: *Goulty & Goodfellow, Manchester.*

J. H. W.

1912
April 23.

REX *v.* MARSHAM.
Ex parte PETHICK LAWRENCE.

Justices — Summary Conviction — Rehearing — Unsworn Evidence at First Hearing—Jurisdiction to rehear Case.

The applicant was convicted by a metropolitan magistrate of assaulting a police constable in the execution of his duty, but by some inadvertence the constable who was assaulted gave his evidence at the hearing of the charge without being sworn. Upon the attention of the magistrate being called to the irregularity, he, later in the same day, reheard the case, all the evidence being then given upon oath. The magistrate again convicted the applicant. A rule having been obtained to quash the second conviction upon the ground (inter alia) that it was bad in that the applicant at the time of the conviction had previously been put in peril in respect of the same offence:—

Held, that the rule must be discharged inasmuch as the applicant had not been legally convicted on the first hearing and had therefore not been in peril at the time of the second hearing, and the second conviction was therefore good.

Rule Nisi calling upon a metropolitan magistrate to shew cause why a writ of certiorari should not issue to remove into the King's Bench Division to be quashed a record of conviction, whereby the applicant, Emmeline Pethick Lawrence, was convicted of an assault on a police constable in the execution of his duty, upon the ground that the conviction was bad in that the applicant at the time of the conviction had previously been put in peril in respect of the same offence, and upon the further ground that the magistrate had no jurisdiction to retry the case against the applicant.

On November 22, 1911, some 200 ladies, among whom was the applicant, were in custody, and on November 23 the police court at Bow Street was very busy. The applicant was there charged under s. 12 of the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), with the summary offence of assaulting a police constable in the execution of his duty, and was also charged under s. 2 of the Prevention of Crimes Amendment Act, 1885 (48 & 49 Vict. c. 75), with obstructing the police constable, and when her case was called on two constables gave evidence, the

one assaulted, through some inadvertence, not being sworn. The applicant cross-examined him, and made a statement, neither calling witnesses nor giving evidence on oath. The magistrate convicted her of the assault upon the police constable in the execution of his duty and sentenced her to one month's imprisonment in the second division. Subsequently, on the same day, a spectator drew the attention of the solicitor who conducted the prosecution to the irregularity, and he informed the magistrate before any conviction had been drawn up. The case was then retried, about one hour and a half after the first trial had been concluded. The two constables gave evidence, on oath, and were again cross-examined by the applicant in person; but on this occasion she called witnesses. In the result the magistrate again convicted her of the assault upon the constable in the execution of his duty and passed the same sentence. He said, in an affidavit made by him, that he dealt with the case at both hearings as though the applicant was charged with assaulting the police constable in the execution of his duty as distinguished from the charge of obstructing him, that the evidence the assaulted constable gave at both hearings was the same and was material and that he believed it, and that he arrived, independently of the first hearing and upon evidence properly adduced before him at the second hearing, at the conclusion that the assault was proved.

Bodkin, for the magistrate, shewed cause. The first conviction must have been quashed upon a writ of certiorari by reason of evidence having been given not on oath at the first hearing: *Reg.* v. *Gibson*. (1) Therefore the first hearing did not place the applicant in peril of being legally convicted.

[He also contended that the magistrate was during the same day sitting in a fully constituted petty sessional court, and that during the continuance of the same petty sessions, i.e., during the same day, he had power and ought to correct any informality brought to his notice in any case heard and determined by him, but the Divisional Court expressed no opinion upon this point.]

(1) (1887) 18 Q. B. D. 537.

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Henlé, in support of the rule. The defendant was placed in peril by the first hearing within the legal meaning of that term. In order to constitute "peril" it is not necessary that the defendant should be in danger of being legally convicted. The defendant is placed in peril by the fact of being tried for an offence in a Court of competent jurisdiction. It is quite true that in the present case the conviction upon the first hearing could have been quashed. But that does not make the hearing a nullity. The magistrate could, had he so desired, have corrected the first proceeding. He could have caused the constable to be resworn in the original case. The test is whether the magistrate could have so corrected the first proceeding as to make the first conviction good. If he could, the applicant was placed in peril and therefore could not be placed in peril a second time.

LORD ALVERSTONE C.J. I am of opinion that the rule should be discharged. The argument has ranged over a greater number of points than it is necessary for the Court to determine, and I propose to base my judgment that this rule must be discharged upon the simple ground that there was before the same magistrate upon the same day a mistrial which would have compelled the Court to quash the conviction on the grounds stated in *Reg.* v. *Gibson* (1), and that being so, it cannot be properly said that the applicant was in peril so as to bar the further proceedings on the same day. If the defendant had been acquitted on the first hearing very different considerations would arise. I am only dealing with the case where a magistrate who has decided to convict discovers during the same day that some evidence was not given on oath. In the present case the magistrate does not say that that evidence was not material; on the contrary he says in his affidavit that he acted on the constable's evidence and that it ought to be regularly before him. Accordingly he treated the first hearing before him on the same morning as a nullity, because it proceeded on evidence which must have compelled this Court to quash the conviction had an application for that purpose been made. He then proceeded de novo

(1) 18 Q. B. D. 537.

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and on the second hearing again gave the applicant the opportunity of giving evidence. She cross-examined the witnesses for the prosecution again and availed herself of the opportunity of calling evidence. On the proper evidence taken before him upon the second hearing on the same day he convicted. It is now sought to set aside that conviction. In order to set aside the second conviction the applicant must shew that the magistrate has done something on the previous hearing which either exhausted his jurisdiction to rehear or which made it unjust that the applicant should be put on her trial in regard to the offence charged. In my judgment the magistrate, finding out that upon the first hearing he had had before him evidence which was not admissible and had therefore not heard and determined the case according to law, was entitled in the exercise of his jurisdiction to have the case heard and tried before him on proper evidence. The rule must be discharged.

PICKFORD J. I agree.

AVORY J. I agree, and with my Lord I specially desire to guard myself from giving any decision upon the point which has been raised about the general jurisdiction of magistrates to rehear a case during the same day. I base my judgment upon this principle only, namely, that the substantial and real ground upon which we are asked to set aside the conviction is that it is bad because the applicant at the time of the conviction had previously been placed in peril in respect of the same offence. That is only another way of saying that she was in a position before the magistrate to plead either res judicata or autrefois convict. It is clear that in order to plead such a plea effectually—either a plea of autrefois acquit or autrefois convict—it must appear that the defendant has been legally convicted or legally acquitted, and it is laid down in Chitty on Criminal Law, 2nd ed., vol. i., p. 455, that "the point in discussion always is whether, in fact, the defendant could have taken a fatal exception to the former indictment; for if he could, no acquittal will avail him." It is also laid down by the same authority at p. 459 that "if a judgment"—and this appears to me to be directly in point in the

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present case—"in favour of a prisoner be reversed, he may be arraigned and tried de novo." In the present case it is admitted that the first judgment, if in fact there ever was one, was a judgment that must have been reversed if proceedings had been taken for that purpose. It would have been quashed on certiorari as having been a judgment given on evidence not upon oath, and therefore it would not have been open to the applicant to plead any such plea because the principles applicable to the plea of autrefois convict are the same as those which I have already enunciated. It is also laid down in the same volume of Chitty on Criminal Law at p. 463 that the plea autrefois convict "will be of no avail when the first indictment was invalid, and when on that account no judgment could have been given, because the life of the defendant was never before in jeopardy." On those grounds I think it is clear that the conviction in the present case earlier on the same day, if there was one, must have been quashed, and consequently the defendant never was in peril and therefore was not in the position on the second hearing to take any exception to the jurisdiction of the magistrate.

Rule discharged.

Solicitors for applicant: *Hatchett-Jones & Co.*
Solicitors for respondent: *Wontner & Sons.*

J. E. A.

In re TEALE.
Ex parte BLACKBURN.

1912
April 24;
May 7.

Bankruptcy—Dismissal of Petition—Receiving Order made on Appeal—Relation back of Order—Transactions with Bankrupt in Interval—Protection of—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 49.

Where on appeal from the dismissal of a bankruptcy petition a receiving order is made, and the order, in accordance with the usual practice of the Court, is antedated as of the date when the petition was wrongly dismissed, for the purposes of s. 49 of the Bankruptcy Act, 1883, by which certain transactions with the bankrupt are protected provided they took place "before the date of the receiving order," the date of the receiving order is the date on which it was made and not the date which it bears.

Appeal from the Leeds County Court.

On June 3, 1910, a bankruptcy petition was presented against H. G. Teale, the act of bankruptcy alleged being the debtor's failure to comply with a bankruptcy notice requiring him to pay to his wife before May 27 a sum of 118*l.* due on a judgment dated May 11, 1910. The petition was heard before the registrar on July 22 and was dismissed. The petitioning creditor appealed. The appeal was heard on October 24, when the Divisional Court allowed the appeal and made a receiving order, which, in accordance with the usual practice of the Court, was dated July 22, that being the date on which the order ought to have been made. The debtor was adjudicated bankrupt on December 8 and H. G. Blackburn was appointed trustee. The debtor, who was a solicitor practising in Leeds, was a customer of the Leeds branch of the Union of London and Smith's Bank. On some dates between July 22 and October 24 he paid into his account at that bank sums amounting in the aggregate to 210*l.*, and between the same dates he drew cheques on that account which were duly honoured by the bank to an aggregate amount exceeding 210*l.* The bank had no notice of any act of bankruptcy by the debtor until November 25.

On January 23, 1912, the trustee served on the bank a notice of motion in the county court for a declaration that all sums of

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money paid into the debtor's banking account after July 22 formed part of the property of the debtor divisible among his creditors, and for an order that the bank should pay to the trustee the sum of 210*l.* On the hearing of the motion it was contended by counsel for the trustee that the payments of the said 210*l.* into and out of the debtor's account with the bank were not protected transactions within s. 49 of the Bankruptcy Act, 1883 (1), inasmuch as they took place after July 22, the date which the receiving order was made to bear. For the bank it was contended that the "date of the receiving order" within the meaning of that section was the date when the order was made, namely, October 24. The judge upheld the contention of the bank and dismissed the motion. The trustee appealed.

E. H. Hansell, for the trustee. As the title of the trustee related back to May 27, the date of the act of bankruptcy, the 210*l.* on being paid into the debtor's account prima facie became the property of the trustee irrespectively of the question whether the account was in credit at the time or not, and the debtor's cheques afforded no authority to the bank for the payment of that money out by them. The dealings with that money were not within the protection of s. 49. A payment does not come within that section unless it satisfies two conditions; it must be without notice of the act of bankruptcy, and it must also take place before the date of the receiving order. For that purpose the "date of the receiving order" means the date which the order

(1) By s. 49 of the Bankruptcy Act, 1883, "Subject to the foregoing provisions of this Act with respect to the effect of bankruptcy on an execution or attachment, and with respect to the avoidance of certain settlements and preferences, nothing in this Act shall invalidate, in the case of a bankruptcy . . . .

"(*d*) Any contract, dealing, or transaction by, or with the bankrupt for valuable consideration;

"Provided that both the following conditions are complied with, namely—

"(1.) The . . . . contract, dealing, or transaction . . . . takes place before the date of the receiving order; and

"(2.) The person (other than the debtor) . . . . by or with whom the . . . . contract, dealing, or transaction was . . . . entered into, has not at the time of the . . . . contract, dealing, or transaction, notice of any available act of bankruptcy committed by the bankrupt before that time."

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is made to bear. The antedating in the present case of the order as of the date when it ought to have been made was in accordance with what has been the settled practice of the Court since *In re Raatz, Ex parte Carlhian.* (1) The payments here were too late, being after the date of the order.

It will be contended on the other side that even if the payments in question are not protected by s. 49 they are protected by the principle of *Cohen* v. *Mitchell.* (2) It was no doubt decided in that case that "until the trustee intervenes all transactions by a bankrupt after his bankruptcy with any person dealing with him bona fide and for value, in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee." But that principle only applies to transactions after the bankruptcy, that is to say, after the adjudication. A person dealing with the debtor between the date of the receiving order and the adjudication is in a worse position than one who deals with him after adjudication. The law on this subject is thus stated in Lord Halsbury's Laws of England, vol. ii., tit. Bankruptcy, s. 269: "The property of the bankrupt divisible amongst his creditors includes not only property which belongs to him at the commencement of the bankruptcy, but also property which may be acquired by or devolve on him before his discharge. But property which is acquired by or devolves on the bankrupt after his adjudication stands on a different footing from property which belonged to him at or before the date of the adjudication. All property which belongs to the bankrupt at the commencement of the bankruptcy or between that time and his adjudication, subject to the provisions of the Bankruptcy Act, 1883, as to protected transactions, vests on the adjudication in the trustee, unless it is property which he can disclaim, and it is disclaimed by him, and no claim or intervention on the part of the trustee is necessary to complete his title. After the adjudication, if the bankrupt acquires property, he may hold it against all the world except his trustee; when the trustee intervenes the bankrupt's right is gone, but before such intervention the bankrupt may, as regards any after-acquired property which is personal estate,

(1) (1897) 4 Manson, 50. (2) (1890) 25 Q. B. D. 262.

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including leaseholds, create valid interests in the property until the trustee intervenes to claim it." Moreover there is a further reason why the doctrine of *Cohen* v. *Mitchell* (1) does not apply. That doctrine is limited to the case of a person acquiring for value some property of the bankrupt. But a dealing by a banker with his customer on current account cannot be regarded as an acquisition of property within that rule; it is nothing more than a borrowing of money from the customer. In all the decided cases on that doctrine there had been a purchase of some interest, such as a share of residue under a will.

Compston, for the respondent bank. The language of s. 49 is admittedly ambiguous; it may refer either to the date appearing on the receiving order or to the date when it was in fact made. But where two constructions are possible, and one of them will not work injustice whereas the other will, the Court will adopt the former. In *In re Manning* (2) it was held that for the purpose of protecting a debtor from arrest under an order of attachment a receiving order is to be deemed to have been "made" within the meaning of s. 9 of the Bankruptcy Act, 1883, on the date when it was pronounced. If that is to be the important date for the purpose of protecting the debtor it ought equally to be so for the purpose of protecting other persons who have bona fide dealings with him. If then the "date of the receiving order" in s. 49 means the date when the order was made, namely, October 24, the receipt by the bank of the 210*l.* and the payment of that money out on the debtor's order were protected by that section. Secondly, they were protected by the rule of *Cohen* v. *Mitchell.* (1) That rule is that all transactions by a bankrupt "after his bankruptcy" are protected until intervention by the trustee. That must mean after the commencement of the bankruptcy, that is to say, after the act of bankruptcy. No doubt the rule assumes the existence of a trustee capable of intervening, and in the early stages of a bankruptcy there is no trustee to intervene; but under r. 170 the Court may at any time after presentation of a petition appoint an interim receiver of the debtor's property, and upon such appointment the interim receiver will be in a position equivalent to that of a trustee.

(1) 25 Q. B. D. 262. (2) (1885) 30 Ch. D. 480.

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[PHILLIMORE J. If the doctrine of *Cohen* v. *Mitchell* (1) is to be taken as applying right back to the commencement of the bankruptcy it is difficult to see why s. 49 was wanted at all.]

If the doctrine does apply to transactions between receiving order and adjudication, it does not the less apply because the transactions were between banker and customer: *In re Montague.* (2)

Hansell in reply. The antedating of the receiving order must affect it equally for all purposes. It cannot be treated as having one date for one purpose and another for another purpose.

Cur. adv. vult.

May 7. The judgment of the COURT (Phillimore and Bray JJ.) was delivered by

PHILLIMORE J. This is an appeal from the decision of the county court judge refusing to order the Union of London and Smith's Bank to pay to the trustee in bankruptcy the sum of 210*l.* representing various sums of money which the bankrupt had paid to the bank between July 22 and October 24, 1910, the first date being that on which the county court registrar ought to have made a receiving order, and the latter being that on which the Divisional Court reversed the decision and made a receiving order, and ordered it to be dated in accordance with the practice back to July 22, the day on which it ought to have been made. If the date of the receiving order is to be deemed for all purposes to be July 22 these payments, and the corresponding payments made by the bank on the bankrupt's cheques, are not protected by s. 49, which relates only to transactions which took place before the date of the receiving order. Nor do they come within the class of dealings had with the bankrupt after adjudication so as to be protected under the doctrine of *Cohen* v. *Mitchell.* (1)

As regards transactions between receiving order and adjudication there is singularly little authority. We do not mean to decide, as it will not be necessary to decide, whether there is any protection for such transactions, but we incline to think that there is none. And yet it may often happen that the interval of time is considerable. The case of *In re Montague* (3), where an

(1) 25 Q. B. D. 262. (2) (1897) 4 Manson, 1.
(3) 4 Manson, 1; 76 L. T. 203.

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application against a bank was refused, might according to the reports appear to be a decision that there is protection for dealings after the receiving order. But in fact, as Mr. Registrar Hope has been good enough to elicit for us, the payments attacked were all made on or after the date of adjudication. The receiving order in that case was on September 25, the adjudication was on October 9, and the three sums paid in were as follows: October 9, 12*l.*; October 12, 200*l.*; December 4, 4*l.*

Putting this question aside, there are two points to consider: 1. Is the practice of dating back receiving orders a sound one? 2. If so, what is the effect upon third parties? The practice by which the Court of Appeal when it makes the receiving order, which the Court of first instance has refused to make, date back to the date when the Court of first instance should have made it, is well established. It may have been inaugurated by Vaughan Williams and Wright JJ. in *In re Raatz, Ex parte Carlhian.* (1) It has been followed pretty generally ever since, always under the direction of the Court. A comparatively recent instance where the Court of Appeal has done so is the unreported case of *In re O'Shea,* where by an order of July 14, 1911, a receiving order was made and dated back to June 15, on which date it ought to have been made. We think it must be taken as sound. If the debtor ought to have had a receiving order made against him by the Court of first instance any conduct of his previous to the date of this order will be punishable or taken into account in considering his discharge, upon the principle that the terminus ad quem in the matter of date shall be the date upon which he ought to have had the receiving order made against him. If there are any cases where those who had previously dealt with the debtor would be affected by the antedating of the order, these cases may have to be considered. Our present judgment does not affect to deal with them. But it is quite another matter when one has to consider the interests of third parties which have accrued in an interval of time which ought never to have come into being, that is between the date when the receiving order ought to have been made by the Court of first instance and that when it was made by the Court of

(1) 4 Manson, 50.

Appeal. These third parties have done nothing wrong, have not procured this improper interval, and have had no improper dealings. The man with whom they dealt had not had a receiving order made against him when they dealt with him, and the ex post facto determination that there should have been a receiving order was made in a proceeding to which they were not parties and cannot affect them. We think it cannot have been intended that these parties should be affected by the antedating of the order, and that the order should not be read as affecting such parties.

Appeal dismissed.

Solicitors for the trustee: *Rossiter & Odell, for Postlethwaite & Rutherford, Leeds.*

Solicitors for the bank: *Warren, Murton & Miller, for Dunning Kay & Armstrong, Leeds.*

J. F C.

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March 9, 16.

Vendor and Purchaser—Sale of Land—Contract in Writing—Signature of Purchaser's Name — Sufficiency of Description — Correspondence referring to Particulars of Sale—Particulars and Conditions of Sale forming one Document—Incorporation of Conditions—Repudiation of Liability—Memorandum of Contract—Measure of Damages for Breach of Contract—Statute of Frauds.

It is not sufficient, in order to constitute a memorandum of a contract for the sale of land within the meaning of s. 4 of the Statute of Frauds, that the name of the purchaser should merely be placed upon the memorandum without any description. It must appear from the memorandum that the name was that of the purchaser of the land.

If the particulars of sale and the conditions of sale form one document and a letter signed by the purchaser refers to the particulars, the reference to the particulars will suffice to incorporate the conditions so as to constitute a sufficient memorandum within the section, and oral evidence may be given for the purpose of identifying the particulars referred to in the correspondence.

Where there is a repudiation in writing of a contract of sale of land

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by the party to be charged, upon the ground that the facts he sets out in the writing do not render him liable, the repudiation does not prevent the documents from containing a signed note of the verbal contract upon which he will be liable if there is, apart from the repudiation, a sufficient note within the Statute of Frauds.

A contract of sale of a farm by auction contained the following condition :—"If the purchaser shall neglect or fail to comply with any of the above conditions his deposit money shall be forfeited to the vendor who may with or without notice resell the premises without previously tendering a conveyance to the defaulter at this sale and any resale may be made by auction or private contract at such time subject to such conditions and in such manner generally as the vendor may think proper and if thereby the vendor shall incur a loss by reason of diminution in price or expenses incurred or both after taking into account the deposit the defaulter at this sale shall pay to the vendor the amount of such loss as liquidated damages and on any such resale by auction the premises may be bought in and all expenses consequent on an unsuccessful attempt to resell shall be forthwith paid to the vendor by the defaulter at this sale."

The purchaser, without having paid any deposit, refused to carry out the contract of purchase. The farm was subsequently resold, and the actual damage suffered by the vendor by reason of the breach of contract was less than the sum the purchaser would have deposited if he had carried out the contract. In an action brought by the vendor against the purchaser for damages for breach of the contract :—

Held, that the condition applied although no deposit had in fact been made, and that the vendor was entitled to recover the amount which would have been deposited by the purchaser if he had performed his contract, and not merely the actual damage suffered by the vendor.

FURTHER CONSIDERATION.

The action was brought by the plaintiff, Major Dewar, to recover damages for the breach by the defendant of a contract for the purchase of a farm known as Bainton Farm, Stoke Lyne, Oxon. The action was tried before Horridge J. and a common jury at the Oxford Winter Assizes, 1912.

The facts were as follows :—

The plaintiff had commissioned Messrs. Franklin & Jones, auctioneers, of Oxford, to sell the farm. The sale was advertised to take place at the Roebuck Hotel, Oxford, at 3 o'clock on June 10, 1911. Particulars of sale (which included a plan of the farm) were drawn up, to which were attached conditions of sale and a memorandum of agreement with spaces for signatures, so that the particulars, memorandum, and conditions

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formed one document. Mr. Mintoft, the defendant, had gone to the Roebuck to partake of refreshment, and had there met the auctioneer, Mr. Jones, with whom he was acquainted. They had some conversation together, but nothing was said about the sale or the farm. Later Mr. Jones went into the sale-room to conduct the sale, and the defendant also went into the room to attend the sale. Some difficulty was experienced in obtaining a bid, and after some time the auctioneer said, "Will any of you gentlemen start me at 1500*l.*?" The defendant replied "Yes, I will," and the farm was quickly knocked down to him. The defendant in his evidence at the trial said that he was confused and thereupon left the room without having paid the deposit or signed any memorandum. After the property was knocked down to the defendant one of the auctioneer's clerks went up to him and inquired his name and address, but there was a conflict of evidence as to whether this happened in the sale-room or outside in the hotel entrance. At the trial the auctioneer produced the copy of the particulars which he had used at the auction and gave evidence to the effect that before the auction he had written upon it, opposite to and on the left of the words "tithe rent-charge" under the heading "Outgoings," the letters £CDDD—this, he said at the trial, meant "reserve price 1000*l.*"—and that on knocking down the farm to the defendant he (the auctioneer) wrote, on the right of the words "tithe rent-charge," "Mr. Mintoft 1500*l.*" The cover of the document which contained the particulars, conditions, and memorandum of agreement was indorsed as follows:—

"By instructions from Major A. W. Dewar.
OXFORDSHIRE.
'Bainton Farm,'
In the Parish of Stoke Lyne.

Solicitors: Messrs. Lowe & Co., 2, Temple Gardens, London, E.C.

Auctioneers and Land Agents: Messrs. Franklin & Jones, Frewin Court, Oxford."

The particulars with the words and letters added by the

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auctioneer as mentioned above and the conditions of sale, so far as material, were as follows:—

"PARTICULARS.

. . . . . .

'BAINTON FARM.'

. . . . . .

"The outgoings are:—

TITHE RENT-CHARGE.

£CDDD

	Commuted Sum. £ s. d.	Average for 1910. £ s. d.
Rectorial ...	59 2 4	41 12 2
Vicarial ...	8 18 6	6 5 8

Mr. Mintoft £1500.

"The land tax has been redeemed.

"The timber has been valued at 148*l.* 19*s.* 3*d.*, and the purchaser will be required to pay for same in addition to the purchase money."

"CONDITIONS OF SALE.

"1. The highest bidder shall be the purchaser the vendor fixing a reserve price and reserving the right to bid up to such price by himself or his agent.

. . . . . .

"Lastly.—If the purchaser shall neglect or fail to comply with any of the above conditions his deposit money shall be forfeited to the vendor who may with or without notice resell the premises without previously tendering a conveyance to the defaulter at this sale and any resale may be made by auction or private contract at such time subject to such conditions and in such manner generally as the vendor may think proper and if thereby the vendor shall incur a loss by reason of diminution in price or expenses incurred or both after taking into account the deposit the defaulter at this sale shall pay to the vendor the amount of such loss as liquidated damages and on any such resale by auction the premises may be bought in and all expenses consequent on an unsuccessful attempt to resell shall be forthwith paid to the vendor by the defaulter at this sale."

The memorandum was as follows :—

"Memorandum.

"Be it remembered that at the sale by auction this 10th day of June, 1911, of the property mentioned in the annexed particulars of sale, of was the highest bidder for the premises and was declared the purchaser thereof, subject to the above conditions, at the price of £ and has paid the sum of £ by way of deposit and agrees to pay to Major Arthur William Dewar, the vendor, according to the above conditions the balance of the said purchase money, including the valuation money, and the vendor and purchaser hereby agree to complete the sale in accordance with above conditions of sale.

Purchase money . .	£	:	:
Timber	£148	19	3
	£	:	:
Deposit	£	:	:

"As agents for the vendor we hereby confirm the sale, and as agents for the Settled Land Act Trustees acknowledge the receipt of the above deposit.

"Abstract of title to be sent to :— "

There was evidence that the auctioneer's clerk called later in the afternoon at the defendant's address to request him to come back and sign the memorandum of agreement of sale, but he failed to find the defendant. There was also evidence that the defendant again saw the auctioneer in the Roebuck at 6 o'clock in the evening, but the auctioneer did not then request him to sign the agreement. Other property in addition to Bainton Farm was put up for sale at the same auction, and before the sale of the other property was over, but after a few of the company, including the defendant, had left the room, the defendant's solicitor, Mr. Norton, approached the auctioneer in the sale-room and told him that the defendant had not intended his bid as a purchase and requested the auctioneer to put up the farm again. This the auctioneer refused to do. On leaving the sale-room the defendant, acting on advice, wrote the following letter :—

"2, Grove Street, Oxford, Saturday, 10th June, 1911. Dear

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Mr. Jones,—Referring to the auction held to-day I have to say that I had no intention whatever of becoming the purchaser of the property, not even knowing where it was. All that I did was only with a view of giving the sale a friendly start. And no one has any authority to sign a contract for sale on my behalf. Yours faithfully, Thomas Mintoft.—F. Jones, Esqre."

This was handed in at Mr. Jones' office at 4.25 P.M. the same day. On June 12, 1911, the plaintiff's solicitors, Messrs. Lowe & Co., wrote a letter to the defendant which (so far as material) was as follows:—

"Dear Sir,

"Re Bainton Farm.

"Referring to the purchase by you of this property on Saturday last we shall be glad if you will send us a cheque for 164*l.* 17*s.* 11*d.* the amount of the deposit payable by you in respect thereof . . . ."

On June 15, 1911, Lowe & Co. again wrote to the defendant a letter in the following terms:—

"Dear Sir,

"Re Bainton Farm.

"We beg to acknowledge your letter of the 14th inst. and in reply to say that our instructions are that you bid at the sale by auction the sum of 1500*l.* for this property and that it was knocked down to you at that price, that when you made the bid the auctioneer entered the amount of it upon the particulars of sale he had before him, and that on its being knocked down to you at that price the auctioneer then entered your name upon such particulars as the purchaser the effect of which was to make a contract which our clients can legally enforce against you and which we are instructed to do. Yours faithfully, Lowe & Co."

On June 18 the defendant wrote the two following letters, the first to the plaintiff and the second to Lowe & Co.:—

(1.) "Dear Sir,

"Bainton Farm.

"Your lawyers Messrs. Lowe have written me about this farm. When the lot was put up there were no bids. Mr. Jones said 'Well, gentlemen, will you start me at 1500*l.*?'

I said 'Yes,' merely in response to his request for a start. There were no more bids, and it was knocked down to me. I have never seen the farm and am quite unable to take it up. I at once told Mr. Jones I had no intention of purchasing, and also delivered a note at his office to the same effect. He had plenty of opportunity of putting up the lot again, if he had wished. All my income is derived from voluntary sources, and if you wish for proof of this statement, I shall be happy to furnish you with it. I beg to say that I am quite unable (even if I were willing) to take the property up, and that it will be useless to look to me for damages which I could not pay, even if you were successful at law.—T. Mintoft."

(2.) "Dear Sirs,

"Re Bainton Farm.

"I have received your letter of the 15th. I beg to repeat that I have made no purchase or contract whatever. What I did was merely to start Mr. Jones according to his request. It is quite likely that as you say, the auctioneer noted the amount on the particulars, and possibly my name also. This is probably what dozens of other persons did for each of the many lots that were sold and does not bind any one or anything. The point is that I have paid no deposit and signed no contract, and that I, long before any contract could have been signed on my behalf, repudiated the matter by word of mouth and by letter. And the auctioneer had ample opportunity of putting the lot up again, if he had so chosen. I cannot think that your client, when these facts are put before him, will seek to fasten me with a property which I have never seen and did not want.—T. Mintoft."

The deposit was in fact never paid, nor did the defendant sign any document except the letters.

The farm was afterwards resold for 1470*l.*, and the actual loss suffered by the plaintiff, namely, the difference between the amount bid at the first sale and the amount realized at the second sale together with the expenses of the second sale, was 90*l.* 10*s.* 6*d.*, reduced, on objection to certain solicitors' costs, to 81*l.* 1*s.* 6*d.* The writ had been issued for the 90*l.* 10*s.* 6*d.*, but was afterwards expanded to 164*l.* 17*s.* 11*d.* by the statement of claim, being as to 150*l.* 10 per cent. deposit on 1500*l.*, the sum bid by the

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defendant, and as to 14*l.* 17*s.* 11*d.* 10 per cent. deposit on the valuation of the timber.

Horridge J. left to the jury the question "Did the defendant make a bid?" (in the sense of being a bid upon which both parties could act).

The jury found that the defendant had made a bid.

At the trial it was contended on behalf of the defendant that the true measure of damages was the sum of 81*l.* 1*s.* 6*d.*, i.e., the difference between the amount of the defendant's bid and the price realized on the resale together with the costs and expenses of the second sale, but Horridge J. held that if the contract was binding upon the defendant the plaintiff was entitled to recover the 164*l.* 17*s.* 11*d.* claimed by him.

The question reserved for further consideration was whether, as there had been a verbal bid at the auction and the property had been knocked down to the defendant, there was a sufficient memorandum in writing to satisfy the provisions of s. 4 of the Statute of Frauds.

E. P. Walsh, for the defendant. There is no memorandum of the contract within the meaning of the Statute of Frauds. That the auctioneer had authority to bind the defendant is established by the judgment of Romer J. in *Sims* v. *Landray* (1) and is therefore admitted. But the auctioneer, although he had authority to bind the defendant as purchaser, never did so, inasmuch as there was no signature by him of the defendant's name as the purchaser: *Buckmaster* v. *Harrop* (2); *Walker* v. *Constable* (3); *Stansfield* v. *Johnson.* (4) If the auctioneer had signed the name of the purchaser with a description of him as purchaser the signature would have been binding upon the defendant, but he did not do so. In *Hubert* v. *Treherne* (5) Tindal C.J. said: "Care ought to be taken, in interpreting the Statute of Frauds, that its efficacy shall not be destroyed by admitting one exception after the other, each case being weaker than that by which it was preceded." *Sims* v. *Landray* (1) is distinguishable as to this point.

(1) [1894] 2 Ch. 318.
(2) (1802) 7 Ves. 341.
(3) (1798) 1 Bos. & P. 306.
(4) (1794) 1 Esp. 101.
(5) (1842) 3 Man. & G. 743.

In that case the purchaser gave direct authority to the auctioneer's clerk to fill in his name as purchaser and stood by while the clerk filled in his name in the proper place for the purchaser's name.

The letters repudiating the contract do not constitute a sufficient memorandum under the Statute of Frauds. *Buxton* v. *Rust* (1), which followed *Bailey* v. *Sweeting* (2), is distinguishable. In *Buxton* v. *Rust* (1) the contract was recognized, not repudiated, and it was held that, as the existence of the contract and its terms were admitted in writing, there was a sufficient memorandum under the Statute of Frauds. But in the present case the defendant by his letters denied the existence of any contract. It is impossible to hold that where a person says in writing that there never was a contract the writing constitutes a memorandum of a contract.

There is no connection between the correspondence and the conditions of sale. The reference to the particulars of sale in the correspondence is not a sufficient reference to the conditions of sale upon which the plaintiff relied. The plaintiff's solicitors cannot impose upon the defendant the liability of bringing into existence a memorandum sufficient to satisfy the provisions of the Statute of Frauds if he acknowledges their letter: *Boydell* v. *Drummond* (3); *North Staffordshire Ry. Co.* v. *Peek.* (4) In the present case there were several copies of the particulars and conditions, and the correspondence does not identify any particular copy as being that to which it refers.

If the plaintiff is entitled to recover he can only recover 81*l.* 1*s.* 6*d.*, the damages for the breach. He is not entitled to a return of the deposit. [*Reynolds* v. *Hooper* (5), *Emmerson* v. *Heelis* (6), *White* v. *Proctor* (7), and *Kenworthy* v. *Schofield* (8) were also referred to.]

W. J. Disturnal, for the plaintiff. The particulars and conditions of sale are contained in one document, and that document together with the correspondence constitutes a sufficient memorandum of the contract to satisfy the requirements of the

(1) (1872) L. R. 7 Ex. 279.
(2) (1861) 9 C. B. (N.S.) 843.
(3) (1809) 11 East, 142.
(4) (1860) E. B. & E. 986.
(5) (1902) 19 Times L. R. 33.
(6) (1809) 2 Taunt. 38.
(7) (1811) 4 Taunt. 209.
(8) (1824) 2 B. & C. 945.

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Statute of Frauds. The particulars to which the letters refer were identified at the trial when the auctioneer's copy marked by him was produced by him and he swore that that copy of the particulars was used by him at the auction. The principle underlying the Statute of Frauds is that all the terms of the bargain are to be set out in writing so that it should not be necessary to resort to oral evidence in order to ascertain them. But the written memorandum is not the contract itself; it is merely evidence of the contract. In the present case the contract was made by the bid and the fall of the hammer. As soon as the hammer fell the contractual relations were complete upon the terms contained in the conditions of sale.

The mere fact that the defendant said (as he in effect did in his letters) "I admit all the facts but I say that there is no contract which binds me" is not sufficient to prevent the correspondence containing a sufficient memorandum within the meaning of the Statute of Frauds: *Lucas* v. *Dixon*. (1) It is true that if the defendant had said in his letters "I never bought for 1500*l*." the evidence would have been insufficient, because there would have been no sufficient memorandum of any contract. But he did not say that.

As to the identification of the document containing the particulars and conditions, the auctioneer's evidence shews that it is the actual document referred to in the correspondence. That is sufficient identification, and the evidence is admissible: *Long* v. *Millar* (2); *Stewart* v. *Eddowes*. (3)

The signature of the defendant's name upon the particulars is sufficient to constitute a signature by his agent, the auctioneer, within the meaning of s. 4 of the Statute of Frauds: *Hubert* v. *Treherne*. (4) If the defendant had personally signed his name it would clearly have been sufficient: *White* v. *Proctor* (5); *Oliver* v. *Hunting*. (6) There is nothing in the Statute of Frauds which requires that the memorandum should contain any description of the purchaser. His name could be upon the particulars for no reason other than that he was the purchaser.

(1) (1889) 22 Q. B. D. 357.
(2) (1879) 4 C. P. D. 450.
(3) (1874) L. R. 9 C. P. 311.
(4) 3 Man. & G. 743.
(5) 4 Taunt. 209.
(6) (1890) 44 Ch. D. 205.

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E. P. Walsh in reply. The decision in *Pierce* v. *Corf* (1) shews that the reference in the correspondence to the particulars is not sufficient to incorporate the conditions of sale.

When the auctioneer wrote "Mr. Mintoft" and "1500*l.*" on the particulars he merely made a memorandum of a name and of an amount which might or might not be a price. But the name did not constitute a signature on behalf of the defendant as purchaser. The word "signed" in s. 4 of the Statute of Frauds means that the name of the purchaser must be signed and it must appear upon the face of the memorandum that he is the purchaser.

Cur. adv. vult.

March 16. The following judgment was read by

HORRIDGE J. This was an action brought by the plaintiff to recover damages for the breach by the defendant of a contract for the purchase of a property known as Bainton Farm, Stoke Lyne. The defence set up before the jury was that although the defendant had in fact bid for the property his bid was not a real bid. The jury found against the defendant upon this issue, and the question reserved for further consideration was whether, as there had been a verbal bid at the auction and the property had been knocked down to the defendant, there was a sufficient memorandum in writing to satisfy the provisions of s. 4 of the Statute of Frauds.

The documents which were suggested on behalf of the plaintiff to contain such memorandum were (1.) the auctioneer's copy of the particulars with plan and conditions of sale, on which were written by the auctioneer the words "Mr. Mintoft 1500*l.*" opposite the description of the outgoings to which the property was subject, and (2.) the subsequent correspondence between the parties, which it was contended on behalf of the plaintiff sufficiently incorporated the particulars and conditions of sale.

The wording of the 4th section of the Statute of Frauds is: "That no action shall be bought to charge any person . . . . upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them . . . . unless the agreement upon which such action shall be brought, or some

(1) (1874) L. R. 9 Q. B. 210.

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memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

In *Sims* v. *Landray* (1) Romer J. said: "It is settled beyond the probability of now being successfully disputed, that where there is a sale by public auction, and the property is knocked down by the auctioneer to the highest bidder, the auctioneer is not only the agent of the vendor, but he is also the agent of the purchaser, the highest bidder; and that he is the purchaser's agent clearly to this extent, that he is entitled to sign, in the name and on behalf of the purchaser, a memorandum sufficient to satisfy the provisions of the Statute of Frauds, stating the particulars of the contract. That is what the auctioneer or his clerk did in this case. Undoubtedly the defendant here was the purchaser of the property. That is proved. The only question is whether the memorandum has been signed sufficiently to answer the Statute of Frauds. Clearly there is a memorandum within the statute. The document states the name of the purchaser, and what the price was. The only question is was that signed by the purchaser or his agent? It was not signed by the purchaser, but it was signed by his agent, as has been settled by authority." It is to be observed that Romer J. said that the document stated the name of the purchaser.

In the present case the point taken before me was that in *Emmerson* v. *Heelis* (2) and *White* v. *Proctor* (3) the names and prices were entered in columns respectively headed in the first case "Purchasers' names" and "Price" and in the second case "Purchaser's name" and "Purchase price," and that in *Sims* v. *Landray* (4), the memorandum into which the auctioneer inserted the name of the defendant shewed that the defendant's name was signed in the capacity of purchaser.

In the present case merely the name of the defendant was inserted without a description, and under it the amount of 1500*l.* was written.

I cannot find any reported authority, nor was I referred to one in the course of the argument, which directly decides that such an

(1) [1894] 2 Ch. 318, at p. 320.
(2) 2 Taunt. 38.
(3) 4 Taunt. 209.
(4) [1894] 2 Ch. 318.

entry is sufficient. The vendor's name appears separately upon the document as authorizing the sale, but I cannot gather anywhere from the document that the defendant is described as purchaser. The letters £CDDD placed on the opposite side of the document were said by the auctioneer to represent the reserve price of 1000*l.* I was referred to *Hubert* v. *Treherne* (1) as shewing that the statement of the name of the party to be charged, although appearing at the head of the proposed agreement in writing, is not a sufficient signature, but that case seems to me to merely decide that where there is to be an agreement in writing containing a number of written conditions the proposed agreement unsigned, although it contains the names of the proposed parties, cannot be relied upon as a memorandum. As was pointed out by Maule J. at the end of his judgment, "This is no more than if it had been said by A. B. that he would sign a particular paper."

I think the memorandum must state both who was vendor and who was purchaser, and I do not think that in the present case the character filled by Mr. Mintoft appears on the memorandum itself, and in my judgment therefore such memorandum is insufficient.

As to the other point, subject to the question as to the letters containing a repudiation of the contract, I think that if the correspondence incorporates the particulars and conditions of sale there is a sufficient memorandum within the statute. The first letter of June 12, 1911, from the plaintiff's solicitors to the defendant says that the property referred to was Bainton Farm. The letter of June 15, 1911, from the plaintiff's solicitors to the defendant states "that when you made the bid the auctioneer entered the amount of it upon the particulars of sale he had before him, and that on its being knocked down to you at that price the auctioneer then entered your name upon such particulars as the purchaser the effect of which was to make a contract which our clients can legally enforce against you."

The answer of the defendant to the plaintiff is headed "Bainton Farm" and, referring to the letter of the plaintiff's solicitors, says: "Your lawyers . . . . have written to me about this farm.

(1) 3 Man. & G. 743.

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When the lot was put up there were no bids. Mr. Jones said 'Well, gentlemen, will you start me at 1500*l.*?' I said 'Yes,' merely in response to his request for a start. There were no more bids and it was knocked down to me. I have never seen the farm and am quite unable to take it up."

And in his letter to the plaintiff's solicitors he said: "It is quite likely that as you say, the auctioneer noted the amount on the particulars, and possibly noted my name also. . . . . The point is that I have paid no deposit and signed no contract, and that I, long before any contract could have been signed on my behalf, repudiated the matter by word of mouth and by letter, and the auctioneer had ample opportunity of putting the lot up again, if he had so chosen."

These letters, it will be seen, contain the full particulars of the verbal contract although they are accompanied by a repudiation of liability. They refer to certain particulars, and on the authority of *Long* v. *Millar* (1) verbal evidence can be given to identify which were the particulars referred to. When the particulars were produced it was seen that they and the conditions of sale formed one document.

It was argued before me that inasmuch as the particulars only are referred to by the defendant the conditions cannot be incorporated although they are in the same document, and *Pierce* v. *Corf* (2) was quoted in support of this contention. That case seems to me to merely decide that inasmuch as the sales ledger in which the entry of the purchase had been made referred neither to the catalogue nor to the conditions of sale the documents could not be connected verbally, but it is no authority for the proposition that if the catalogue had been referred to in the sales ledger it would not have incorporated the conditions which were physically attached to the catalogue. Blackburn J. goes so far as to say in effect (3) that if the letter which merely quoted lot 49 had mentioned the sale price he is inclined to think that the reference to the sale would have incorporated the conditions as stated in the catalogue. I hold that subject to the question of the letters containing a repudiation of the contract there was a

(1) 4 C. P. D. 450. (2) L. R. 9 Q. B. 210.
(3) L. R. 9 Q. B. at p. 216.

sufficient memorandum contained in the letters coupled with the reference to the particulars which were contained in the same document as the conditions.

Prior to the decisions in *Bailey* v. *Sweeting* (1), *Wilkinson* v. *Evans* (2), and *Buxton* v. *Rust* (3) the law was stated in Blackburn on the Contract of Sale, 1st ed. at p. 66, as follows: "It sometimes happens that after a dispute has arisen a party in a letter signed by him recapitulates the whole terms of the bargain for the purpose of saying that the bargain is at an end for some reason which is evidently insufficient in law. It has never been decided whether such an admission of the terms of the bargain signed for the express purpose of repudiation can be considered a memorandum to make the contract good, but it seems difficult on principle to see how it can be so considered." This passage, however, has by these cases clearly been decided not to be correct law.

In the present case it is true that the defendant does not merely acknowledge the contract and refuse to carry it out, but first sets out the bid and the knocking down of the property, which would make a verbal contract, and then writes, "The point is that I have paid no deposit and signed no contract"; but in my view he repudiates on the ground that the facts he has set out do not render him liable, and his so doing does not prevent the documents from containing a signed note of the verbal contract on which his liability arises if there is a sufficient note within the Statute of Frauds.

I think the defendant is liable in this action upon the ground that, the jury having found the verbal contract, the letters and particulars and conditions constitute a sufficient memorandum.

At the trial it was contended before me that the paragraph beginning "Lastly" at the end of the conditions of sale did not apply inasmuch as the deposit had not been paid, and that the only damages which could be recovered were the actual loss and expenses on resale. I ruled that the defendant could not put himself in a better position by refusing to pay the deposit than if the deposit had in fact been paid, in which case it could be

(1) 9 C. B. (N.S.) 843. (2) (1866) L. R. 1 C. P. 407.
(3) L. R. 7 Ex. 279.

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retained by the seller (*Wallis* v. *Smith* (1)), and I directed the jury that the damages should be 164*l.* 17*s.* 11*d.* If I am wrong in my direction it was agreed that the actual loss and expenses were 81*l.* 1*s.* 6*d.*

I give judgment for the plaintiff for the sum of 164*l.* 17*s.* 11*d.* The costs of and occasioned by the further argument before me will be costs in the action.

In case I am held to be wrong as to the amount of the damages, and the proper damages are only 81*l.* 1*s.* 6*d.*, I think it right to certify that there was sufficient reason for bringing the action in the High Court.

Judgment accordingly.

Solicitors for plaintiff: *Lowe & Co.*

Solicitors for defendant: *Marshall & Pridham, for J. C. Norton, Oxford.*

J. E. A.

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April 2.

RETAIL DAIRY COMPANY, LIMITED *v.* CLARKE.

Adulteration—Milk—Written Warranty—Copy of Warranty with written Notice of Intention to rely thereon "sent" to Purchaser "within seven days" after Service of Summons—Time—Sale of Food and Drugs Act, 1899 (62 & 63 *Vict. c.* 51), *s.* 20, *sub-s.* 1.

By s. 20, sub-s. 1, of the Sale of Food and Drugs Act, 1899, "a warranty or invoice shall not be available as a defence to any proceeding under the Sale of Food and Drugs Acts unless the defendant has, within seven days after service of the summons, sent to the purchaser a copy of such warranty or invoice with a written notice stating that he intends to rely on the warranty or invoice, and specifying the name and address of the person from whom he received it, and has also sent a like notice of his intention to such person":—

Held, that in the absence of any words in the sub-section indicating that the word "sent" is used with any other than its ordinary meaning of "dispatched" it must be construed as bearing that meaning, and that if a copy of the warranty with the written notice is posted to the purchaser within seven days from the issue of the summons it is "sent" in compliance with the requirement of the sub-section although it does not reach him till after the expiration of the seven days.

CASE stated by justices for the county of Middlesex.

An information was preferred by the respondent Clarke under

(1) (1882) 21 Ch. D. 243.

the Sale of Food and Drugs Acts, 1875 to 1899, against the appellants, the Retail Dairy Company, Limited, for that they on July 24, 1911, unlawfully did sell to the prejudice of the purchaser thereof a certain article of food, to wit, one pint of new milk, which was not of the nature, substance, and quality of the article demanded by such purchaser inasmuch as the new milk contained 9 per cent. of added water.

At the hearing before the justices, which took place on August 30, 1911, the following facts were proved or admitted :—

On July 24, 1911, the respondent, an inspector of nuisances employed by the Chiswick Urban District Council, purchased from the appellants' servant, who was delivering milk in Thornton Avenue, Chiswick, a pint of new milk.

The respondent duly complied with the requirements of s. 14 of the Sale of Food and Drugs Act, 1875.

The sample delivered to the public analyst by the respondent was not genuine by reason of the addition thereto of 9 per cent. of water and was not of the nature, substance, and quality of the article demanded by the respondent.

Proceedings were instituted on August 4, 1911, and the summons was duly served on the appellants at their registered office at Bristol on August 12, 1911.

On Saturday, August 19, 1911, the appellants through their solicitors sent by post from Bristol to the respondent at his address at Chiswick a notice in writing that they had purchased the new milk in question as the same in nature, substance, and quality as that demanded of them by the respondent and with a written warranty to that effect, and specifying the name and address of the person from whom they received the written warranty, and sent a copy of such written warranty at the same time to the respondent and also sent a like notice by post at the same time to the person from whom they received the warranty.

The notice and copy warranty did not reach the hands of the respondent at Chiswick until Monday, August 21, 1911.

On behalf of the respondent it was contended before the justices that, assuming but not admitting the warranty to be a good defence to the proceedings, it was not available, inasmuch as notice of intention to rely on the warranty had not been sent to

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the respondent in accordance with the requirements of s. 20 of the Sale of Food and Drugs Act, 1899. (1)

On the part of the appellants it was contended that the notice had been duly sent.

The justices were of opinion that the notice should have been sent so as to reach the respondent within seven days after service of the summons, and as it did not reach the respondent before August 21, 1911, it had not been sent within seven days after service of the summons, and therefore the warranty was not available as a defence to the proceedings, and that the appellants were guilty of an offence under the Acts. They accordingly convicted the appellants of the offence with which they were charged. Having regard to their decision that the appellants were thus precluded from relying on the warranty by reason of their notice being out of time the justices did not determine whether or not the warranty would otherwise have been a good defence.

The question for the opinion of the Court was whether upon the above statement of facts the justices came to a correct determination in point of law.

During the arguments in the Divisional Court the envelope

(1) Sale of Food and Drugs Act, 1875, s. 6: "No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding twenty pounds; . . . ."

Sect. 25: "If the defendant in any prosecution under this Act prove to the satisfaction of the justices or Court that he had purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor, and with a written warranty to that effect, that he had no reason to believe at the time when he sold it that the article was otherwise, and that he sold it in the same state as when he purchased it, he shall be discharged from the prosecution, but shall be liable to pay the costs incurred by the prosecutor, unless he shall have given due notice to him that he will rely on the above defence."

Sale of Food and Drugs Act, 1899, s. 20, sub-s. 1: "A warranty or invoice shall not be available as a defence to any proceeding under the Sale of Food and Drugs Acts unless the defendant has, within seven days after service of the summons, sent to the purchaser a copy of such warranty or invoice with a written notice stating that he intends to rely on the warranty or invoice, and specifying the name and address of the person from whom he received it, and has also sent a like notice of his intention to such person."

addressed to the respondent and containing the copy warranty and the written notice was produced to the Court and bore the post mark "Bristol 3.45 P.M. Aug. 19, 1911."

Cecil Whiteley, for the appellants. The notice was "sent" within seven days after service of the summons within the meaning of s. 20, sub-s. 1, of the Sale of Food and Drugs Act, 1899. If the copy of the warranty with the written notice is posted within the seven days it is "sent" within the seven days although it does not reach its destination until after the expiration of the seven days. *Browne* v. *Black* (1) is distinguishable. The decision in that case turned upon the construction of the words "sent by the post" in s. 37 of the Solicitors Act, 1843 (6 & 7 Vict. c. 73). That section contains other expressions which shew that the word "sent" is there used in the sense of the solicitor's bill being sent so as to reach the client one clear calendar month before an action is commenced. But there are no such words in s. 20, sub-s. 1, of the Sale of Food and Drugs Act, 1899, and the word "sent" must therefore be read in its ordinary meaning of "dispatched." The word "sent" impliedly authorizes the notice being sent by post. The word "sent" is not equivalent to "served," but to "transmitted," and the decision in *Holland* v. *Peacock* (2) shews that placing the notice in the letter-box within the seven days is sufficient. The judgments in *Browne* v. *Black* (1) are in the appellants' favour. If any delay occurred while the notice was in transit the prosecution could if necessary ask for an adjournment and would therefore not be prejudiced.

There is a distinction between the meaning of "within so many days" and "after" the solicitor "shall have delivered . . . . a bill" which occurred in *Browne* v. *Black*. (1) In that case it was important that the bill should be delivered to the client a certain number of days before the action could be commenced, and the time must therefore be reckoned from the time of the delivery of the bill. But an adjournment if necessary would prevent any hardship to the prosecution in proceedings under the Sale of

(1) [1912] 1 K. B. 316. (2) [1912] 1 K. B. 154.

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RETAIL DAIRY COMPANY, LIMITED v. CLARKE.

Food and Drugs Act, 1899. [*Reg.* v. *Inhabitants of Slawstone* (1) and *Blunt* v. *Heslop* (2) were also referred to.]

Grimwood Mears, for the respondent. The word "sent" received judicial interpretation in *Reg.* v. *Recorder of Richmond* (3), and in that case it was held that it meant "sent so as to reach." It is true that the word "given" was also in s. 9 of the Poor Law Procedure Act, 1848 (11 & 12 Vict. c. 31), upon which the decision turned, and there appears to be no authority upon the meaning of the word "sent" where it alone occurs. *Holland* v. *Peacock* (4) was decided upon its own special facts. By s. 26 of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), it is enacted that where a statute authorizes or requires any document to be served by post, whether the expression "send" or any other expression is used, the service is to be deemed to have been effected at the time at which the letter would be delivered in the ordinary course of post.

The object of s. 20, sub-s. 1, of the Sale of Food and Drugs Act, 1899, was to give the prosecution time to make an examination of the warranty which is intended to be relied upon as a defence. The notice and a copy of the warranty must be posted at such a time that in the ordinary course of post they will be received within seven days after service of the summons. That construction was placed upon the word "sent" in *Reg.* v. *Inhabitants of Slawstone* (1), and *Browne* v. *Black* (5) is in harmony with the previous decisions.

RIDLEY J. In this case the question arises as to the proper construction to be placed upon s. 20, sub-s. 1, of the Sale of Food and Drugs Act, 1899. The question is whether in the circumstances of this case the document was "sent" by the appellants within seven days of the service of the summons. The facts are that the summons was served on the appellants on August 12, 1911, and on August 19, 1911, the appellants through their solicitors sent by post from Bristol to the respondent at his address at Chiswick a written notice in the

(1) (1852) 18 Q. B. 388.
(2) (1838) 8 Ad. & E. 577.
(3) (1858) 27 L. J. (M.C.) 197.
(4) [1912] 1 K. B. 154.
(5) [1912] 1 K. B. 316.

terms of the sub-section in question, and they sent at the same time a copy of the warranty to the respondent, and also a like notice by post to the person from whom they received the warranty. The envelope which was addressed to the respondent has been produced to us, and it bears the post mark "Bristol 3.45 P.M. Aug. 19, 1911." It is questionable whether in the ordinary course of post it would have been delivered at Chiswick the same night. That fact, however, is immaterial, because in my judgment s. 20, sub-s. 1, of the Sale of Food and Drugs Act, 1899, was complied with by posting the documents within the prescribed time. Sending in the ordinary sense is merely dispatching. The word "send" may, however, be used in connection with other words so as to imply that by "sending" is meant such a sending as that the thing may by the time specified pass into the hands of the person to whom it was sent. If s. 20, sub-s. 1, of the Sale of Food and Drugs Act, 1899, had contained words to that effect it would be necessary to follow the decisions in *Browne* v. *Black* (1) and *Reg.* v. *Inhabitants of Slawstone.* (2) But there are no such words in this section; nor is there any need for them, for no period is fixed by the Act of 1899 as being that which must elapse after the receipt of the document before the recipient can take such steps as may be necessary in consequence of its reception.

The decision in *Browne* v. *Black* (1) turned upon the true construction of s. 37 of the Solicitors Act, 1843, which provides that no solicitor shall commence any action for the recovery of any fees, charges, or disbursements "until the expiration of one month after such . . . . solicitor . . . . shall have delivered unto the party to be charged therewith, or sent by the post to or left for him at his counting-house, office of business, dwelling-house, or last known place of abode, a bill of such fees, charges and disbursements." The question was whether the words "sent by the post" in that section had been complied with by posting on February 15, 1910, a signed bill of costs to the defendant which in the ordinary course of post was delivered to the defendant on the morning of February 16, 1910,

(1) [1912] 1 K. B. 316. (2) 18 Q. B. 388.

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the action being commenced on March 16, 1910. It was held by the Court of Appeal that a bill of costs is not "sent by the post" to the party to be charged one month before action within the meaning of the section unless it is posted at such a time that it would in the ordinary course of post be delivered to the party to be charged one clear calendar month before the day on which the action is commenced. In that case the section contained words which indicated that the date on which the bill was received was the date from which the month was to run, and therefore there was a reason for the decision that the word "sent" imported not merely the dispatch of the bill but the sending of it at such a time that in the ordinary course of post it would be delivered a month before the action was brought. Buckley L.J. in a dissenting judgment did not adopt that view. He said that in ordinary English "sending" means "dispatching," and he did not adopt the reasoning of the other members of the Court, who pointed out that the section then under consideration contained words which indicated that the bill should be sent so as to be delivered in the ordinary course of post one clear month before the commencement of the action. The decision in that case shews that unless words of a similar nature are to be found in s. 20, sub-s. 1, of the Sale of Food and Drugs Act, 1899, the word "sent" ought to be construed as meaning what it says, namely, that "sent to" does not mean sending the document so that it will in the ordinary course of post be delivered within the prescribed time, but merely that it must be dispatched within the prescribed time.

The decision in *Reg.* v. *Inhabitants of Slawstone* (1) turned upon s. 9 of the Poor Law Procedure Act, 1848 (11 & 12 Vict. c. 31), which contains words which satisfy the rule enunciated in *Browne* v. *Black* (2), though not so clearly as those contained in s. 37 of the Solicitors Act, 1843, because s. 9 of the Poor Law Procedure Act, 1848, provides that a "period of fourteen days after the sending of" the copy of depositions on which an order of removal is made "shall be allowed for the giving of such notice of appeal." The judgments in that case shew that the words "giving" and

(1) 18 Q. B. 388. (2) [1912] 1 K. B. 316.

"sending" were regarded as correlative. In *Browne* v. *Black* (1 Kennedy L.J. said: "In *Reg.* v. *Inhabitants of Slawstone* (2), as Vaughan Williams L.J. has pointed out, it was held, quite apart from the argument that in 11 & 12 Vict. c. 31, s. 9, the expression 'sending' as regards the copy of the depositions and the expression 'giving' as regards the notice of appeal should be construed reciprocally, that the effect of the section was that the notice of appeal must be held to be given at the time when according to the ordinary course of post it would reach the party to whom it was sent."

It seems to me, therefore, that the judgments in *Browne* v. *Black* (1) indicate what our decision ought to be in the present case, and that the decision in *Holland* v. *Peacock* (3) points in the same direction. Lord Alverstone C.J. in giving judgment in *Holland* v. *Peacock* (3) said that s. 2 of the Summary Jurisdiction Act, 1857, provides "that the case must be transmitted to the Court within three days after it has been received by the appellant. There is in my opinion a distinction between transmitting a document and serving it. If the word 'serve' had been used in the section, the objection would probably have been fatal, for service can only be effected between certain prescribed hours; but as the section only says 'transmit,' in my opinion we ought not to apply to this case the rules as to hours of service, which would in some cases give rise to great difficulty." By that judgment a distinction seems to be drawn between the transmission of a document—which is equivalent to sending it—and the service of it. The decision in that case is not an absolute authority which covers the present case, but in my opinion it shews that in the absence of any words in s. 20, sub-s. 1, of the Sale of Food and Drugs Act, 1899, indicating that the word "sent" means sent so as to be received within a certain time the proper interpretation of the word is simply "sent" in its ordinary meaning.

In these circumstances I think that putting in the post on the afternoon of August 19, 1911, the copy of the warranty and the notice was a sufficient compliance with the section. Sect. 26 of

(1) [1912] 1 K. B. 316. (2) 18 Q. B. 388.
(3) [1912] 1 K. B. 154.

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the Interpretation Act, 1889, throws no light upon the matter. It has no application where the statute to be interpreted says nothing about service by post.

The appeal must therefore be allowed and the conviction quashed.

A. T. LAWRENCE J. I am of the same opinion. I do not think we can make additions to the words of the statute. The documents in question were "sent" within seven days after the service of the summons. They were sent by post in the ordinary way. All the statutes which were dealt with in the cases which have been cited contained words which indicated some meaning other than the natural one of the word "send." There is no such qualification in the statute with which we have to deal. In my judgment the documents were sent within the seven days as required by the statute, and as they were so sent the object of the statute was attained. The purchaser received notice of the defence which was going to be set up nine days before the hearing, and there is nothing which compels us to prevent the case being dealt with on the merits.

PICKFORD J. I am of the same opinion. Sect. 20, sub-s. 1, of the Sale of Food and Drugs Act, 1899, prohibits a warranty being set up as a defence in any proceeding under the Sale of Food and Drugs Act, 1875, unless the defendant has sent to the purchaser within seven days after the service of the summons a copy of the warranty with a written notice that he intends to rely upon it. The word "sent" may simply mean "dispatched," it may mean "sent to and received," or it may mean "sent so that in the ordinary course of post it would be received." The last is the meaning contended for on behalf of the respondent. The Court of Appeal in *Browne* v. *Black* (1) dealt with very similar words which are contained in s. 37 of the Solicitors Act, 1843. The majority of the Court of Appeal held that the words "sent by post" in that section meant that the bill must have been posted at such a time that in the ordinary course of post it would be delivered to the party to be charged one clear month before the commencement of the action. Buckley L.J., who dissented, held that, although the word "sent" was used in

(1) [1912] 1 K. B. 316.

collocation with other words, the meaning to be given to it was its ordinary meaning. In giving judgment he said: "In ordinary English 'sending' something means, I think, 'dispatching' it. If I say that on a certain day I 'sent to' some one a brace of pheasants, I mean that I sent them to him on the day when I dispatched them, although he may not receive them till a time when they will be of no use to him. That is the ordinary meaning of the words." Therefore he held that the word "sent," even though used in collocation with other words, meant "dispatched." The other members of the Court did not take this view, but Kennedy L.J. said: "I agree that, if one had merely to consider the words 'sent by the post to' apart from their context, it might be that they would mean merely 'put into the post,' but one must construe them by the light of the context." The Court of Appeal, therefore, by a majority held that construed in the light of their context the words "sent by post to" meant sent at such a time that the document would in the ordinary course of post be received a clear month before the action was commenced.

In *Reg.* v. *Inhabitants of Slawstone* (1) and *Reg.* v. *Recorder of Richmond* (2), where the word "sending" was construed to mean sending the document at a time when in the ordinary course of post it would reach the party to whom it was sent, the word was used in collocation with other words in such a way as to require the meaning which I have mentioned to be given to it. But no such words are used in s. 20 of the Sale of Food and Drugs Act, 1899, and it therefore seems to me that the decisions in those cases are no authority against construing the word "sent" as having the ordinary meaning which was attached to it by Buckley L.J. If we construe the word in that way, these documents were sent within seven days after service of the summons as required by s. 20 of the Act of 1899.

Appeal allowed. Conviction quashed.

Solicitors for appellants: *W. T. Ricketts & Son.*

Solicitors for respondent: *Savery & Stevens.*

(1) 18 Q. B. 388. (2) 27 L. J. (M.C.) 197

J. E. A.

1912
April 2.

GENERAL ESTATES COMPANY *v.* BEAVER.

County Court—Practice—Transferred Action—Title to Franchise—Jurisdiction—Certiorari—"Action commenced in the county court"—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *ss.* 56, 69, 114, 124, 126.

By s. 126 of the County Courts Act, 1888, the High Court or a judge thereof may order the removal into the High Court by writ of certiorari or otherwise of any action or matter commenced in the county court under the provisions of the Act.

A writ having been issued in the Chancery Division of the High Court for an injunction to restrain disturbance of a ferry, the judge in the Chancery Division, on an interlocutory application for an interim injunction, ordered the action to be transferred to the county court under s. 69 of the County Courts Act.

By s. 56 of the Act it is provided that except as in the Act provided the county court shall not have cognizance of any action in which the title to any franchise shall be in question. During the proceedings in the county court it became apparent that the title to the ferry was in question. An application was accordingly made under s. 126 of the Act to remove the action into the High Court:—

Held, that the action was "commenced in the county court" within the meaning of that section, and that the High Court had jurisdiction to make the order.

APPEAL from a judge in chambers.

An application had been made to a Master in chambers in the circumstances hereinafter appearing to remove into the High Court under s. 126 of the County Courts Act, 1888, an action then pending in the county court of Norfolk holden at Great Yarmouth. The Master refused the application. On appeal the judge in chambers affirmed the Master.

The plaintiffs had issued a writ in the Chancery Division claiming an injunction to restrain the defendant from disturbing a ferry. Before delivery of the statement of claim the plaintiffs applied for an interim injunction until the hearing. The learned judge in the Chancery Division, being unaware that the title to the ferry was in anywise in question, made an order under s. 69 of the County Courts Act, 1888 (1), for the transfer of the action to the county court of Norfolk. On the hearing the county court judge granted an injunction restraining the defendant from disturbing the ferry. The defendant appealed to the King's Bench

(1) See note on p. 404, post.

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Division. During the hearing of the appeal it became apparent that the title to the ferry was in question between the parties. The Court ordered a new trial, expressing at the same time a doubt as to the jurisdiction of the county court in view of the provisions of s. 56 of the County Courts Act, 1888. The plaintiffs then applied in chambers under s. 126 of the Act for an order removing the action into the High Court. The Master and the judge in chambers refused the application as above stated.

The plaintiffs appealed.

Danckwerts, K.C., and *A. H. Poyser*, for the appellants. This action was "commenced in the Court"—i.e., the county court—"under the provisions of this Act" within the meaning of s. 126 of the County Courts Act, 1888. As soon as the transfer under s. 69 takes effect the action or matter becomes subject to the operation of Order XXXIII. of the County Court Rules, 1903 and 1904. The plaintiff lodges with the registrar the order of transfer together with the pleadings, affidavits, and other documents filed in the High Court, the names and addresses of the parties, and the statement of claim or a concise statement of the particulars of claim such as would be required on entering a plaint. The registrar under r. 2 indorses on the order the date on which it was lodged and files it; then "the action or matter shall proceed in all things as if it were an ordinary action in the Court." The registrar enters the action or matter for trial and gives notice to the parties of the day appointed. Thereupon by r. 3 the defendant "shall proceed in all things in the same way as if the action had been brought in the county court, and the notice so served upon him was an ordinary summons." It is absurd that this action should remain in the county court which has no jurisdiction to deal with it. By s. 56 the Court has no cognizance of any action in which the title to any franchise shall be in question. By s. 114 whenever an action is commenced over which the Court has no jurisdiction the Court "shall order it to be struck out." The High Court cannot confer on the county court a jurisdiction which is not vested in it by statute: *Toon* v. *Stanbury-Eardley*. (1)

(1) (1906) 22 Times L. R. 536.

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Secondly, if there is no jurisdiction to remove this case by certiorari under s. 126 there is jurisdiction to do so at common law. A section like s. 124 taking away a common law right to remove by certiorari does not apply when the inferior Court has no jurisdiction: *Ex parte Bradlaugh.* (1)

H. Claughton Scott, for the respondent. There is no jurisdiction under s. 126 to remove this action into the High Court, because the action or matter was not "commenced" in the county court under the provisions of the Act. It was commenced in the High Court. It was transferred to the county court under s. 69. That section does not provide, as ss. 65 and 66 do, that an action or matter transferred shall be treated in all respects as if the action or matter had been originally commenced in the county court. When the action is transferred under s. 69 it is to be "carried on in the Court to which the same shall be ordered to be transferred." The section goes on to say that "the parties thereto shall have the same right of appeal as they would have had if the action or matter had been commenced in such Court." But a right to a writ of certiorari is not a right of appeal. The provisions of Order XXXIII. of the County Court Rules cannot alter the plain construction of s. 126. If a certiorari is not available under that section it is not available at all, because by s. 124 no action or matter can be removed by certiorari or otherwise save in the manner and according to the provisions in the Act mentioned: see *Skinner* v. *Northallerton County Court Judge*, per Lord Halsbury. (2) Sect. 126 is not applicable and therefore this case cannot be removed at all.

Secondly, in the circumstances the county court has jurisdiction. The county court judge is not bound to consider how the case comes to be remitted to him. He may presume that the order remitting is validly made: *Dierken* v. *Philpot.* (3) Furthermore, the plaintiffs by their conduct have consented to the jurisdiction of the county court. Therefore s. 114 does not apply and the county court judge is not bound to strike out the case. That section expressly excepts the case where the parties consent to the Court having jurisdiction.

(1) (1878) 3 Q. B. D. 509. (2) [1899] A. C. 439, at p. 441.
(3) [1901] 2 K. B. 380.

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Danckwerts, K.C., in reply. The words in s. 114 "unless the parties consent to the Court having jurisdiction" refer to those sections of the Act which give the Court jurisdiction by consent of the parties, and that consent is subject to the limitations and restrictions imposed by those sections. In a case like the present where the title to a franchise comes directly in question the county court has no jurisdiction whatever: s. 56. Where the title to a franchise comes incidentally in question, then by consent in writing of the parties the Court may have jurisdiction. Here there is no consent in writing. The parties to an action cannot by consent confer on a Court a jurisdiction which it has not got, and where the want of jurisdiction appears on the face of the proceedings a writ of prohibition goes as of course: *Farquharson* v. *Morgan*. (1)

HAMILTON J. This is an appeal from the refusal of Bucknill J. in chambers to interfere with the refusal of Master Chitty to order that an action pending in the county court of Norfolk should be removed into the High Court under s. 126 of the County Courts Act, 1888.

The plaintiffs claimed an extensive franchise of ferry on the river Yare. The defendant appeared to be acting in disturbance of this franchise. The plaintiffs issued a writ in the Chancery Division claiming an injunction. Before delivering a statement of claim the plaintiffs applied for an interim injunction. The defendant did not appear to oppose this application, and the learned judge, having no reason to suppose that the title to the ferry was in question, ordered the action to be transferred under s. 69 of the County Courts Act, 1888, to the county court of Norfolk. The action then came on for trial in the county court and judgment was given for the plaintiffs. The defendant appealed to the Divisional Court, claiming a new trial on the ground that there was no evidence to support the plaintiffs' title to the franchise. On the hearing of that appeal it became evident that the plaintiffs' title came prominently in question and that consequently the jurisdiction of the county court was a matter of grave doubt. In the result the Divisional Court simply

(1) [1894] 1 Q. B. 552.

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made an order for a new trial, while questioning whether the county court was the proper tribunal in which the new trial should be held. The plaintiffs then, after considering their position, applied to the Master in chambers to remove the case to the High Court. Sect. 126 of the County Courts Act, 1888, provides for the removal into the High Court of "any action or matter commenced in the Court"—i.e., the county court—"under the provisions of this Act." It is argued that it is desirable, not to say imperative, that the trial should take place elsewhere than in the county court because that Court has no jurisdiction. On the other side it is said that the county court may have jurisdiction under s. 114 if the requisite consent is given to the jurisdiction of the Court; and that in the present case the requisite consent has been given. Sect. 56 of the Act expressly excepts from the jurisdiction of the Court any action in which the title to any franchise shall be in question. Sect. 61 provides special terms upon which alone the title to a franchise may come under the cognizance of the county court, namely, when the matter comes incidentally in question and both parties at the hearing consent in writing signed by them or their solicitors. There is no possibility of any such consent being given in this case. Sect. 114 provides that whenever an action is commenced over which the Court has no jurisdiction the judge is to strike it out unless the parties consent to the Court having jurisdiction. It is said that by their conduct the parties have consented to the jurisdiction, the defendant by so faintly raising the question that the learned judge at the trial did not appreciate it, the plaintiffs by allowing a long period to elapse before applying to the Master in chambers under s. 126, and both parties by refraining from applying to have the case struck out under s. 114. In my view there is no evidence of consent. The plaintiffs have done all they could to shew that they would not consent to a trial anywhere but in the High Court. Moreover s. 114 does not enable the parties by consent to confer upon the county court a general jurisdiction or a jurisdiction which is not vested in that Court by other sections of the Act beyond the limited power to strike the case out and award costs. The clause "unless the

parties consent to the Court having jurisdiction" refers to cases where the Act has conferred upon the Court a jurisdiction by consent of the parties, for example in cases provided for by s. 61, where the title to any corporeal or incorporeal hereditament, or to any toll, fair, market, or franchise incidentally comes in question. Even then the consent must be given in the manner provided by that section. In the present case, assuming that the title to the franchise arises only incidentally, the consent, if any, is not in writing. Therefore the county court has no jurisdiction in this case. That makes it very desirable that the case should be removed into the High Court. It is said that this is not feasible, because the only power of removal is under s. 126, which applies only to an action or matter commenced in the county court, and s. 124 forbids the removal by any other means. In my judgment it would be wise to hold that s. 124 does not interfere with the right at common law to remove into the superior Court a proceeding pending in a Court which has no jurisdiction to try it. But that is not the question before us. On this appeal we have to decide the meaning of the words in s. 126 "action or matter commenced in the Court," i.e., the county court. Mr. Scott has argued that those words are confined to an action or matter which has actually been commenced by plaint or other process in the county court, or to an action which although originally commenced in the High Court has been remitted under s. 65 or s. 66 to the county court. There, it is said, the effect of s. 126 ends, there being no words in s. 69, as there are in ss. 65 and 66, providing that upon transfer from the High Court the action and all proceedings therein shall be tried and taken in the county court "as if the action had been originally commenced therein." I do not consider the absence of those words from s. 69 fatal to this application. The words of s. 126 are that it shall be lawful for the High Court or any judge thereof to order the removal into the High Court, by writ of certiorari or otherwise, of "any action or matter commenced in the Court under the provisions of this Act." When an order is made under s. 69 the action or matter is to be carried on in the Court to which it has been transferred. When it has reached the offices of the county court

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the machinery of that Court applies and the action or matter is thenceforward commenced in the county court under the provisions of the Act. Then it may be removed into the High Court under s. 126. There is no reason for limiting a retransfer to cases where the action is correctly remitted under s. 65 or s. 66, and it is undesirable that a transfer made per incuriam under s. 69 should be irremediable. Upon the true construction of s. 126 this was an "action or matter commenced in the Court under the provisions of this Act" within the meaning of that section. It has been sent to the county court and then commenced there under the provisions of the Act. We have therefore power under s. 126, which we ought to exercise, to order the removal of this action. If it had been a mere matter of discretion we should not lightly have interfered with the order under appeal; but it is more than that. This is an action which cannot be heard in the county court for want of jurisdiction in that Court. When the matter comes before the judge he must strike it out under s. 114. It is a matter of right that it should be transferred to the High Court, and in my opinion we have power to transfer it under s. 126. The appeal must be allowed.

AVORY J. I agree.

Appeal allowed. Action transferred.

Solicitors for appellants: *Morris & Bristow, for Harmer, Ruddock & Son, Great Yarmouth.*

Solicitors for respondent: *Dubois & Co., for Chamberlin, Talbot & Bracey, Great Yarmouth.*

NOTE.—County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 56: "All personal actions, where the debt, demand, or damage claimed is not more than fifty pounds [now one hundred pounds, see 3 Edw. 7, c. 42, s. 3], whether on balance of account or otherwise, may be commenced in the Court; and all such actions shall be heard and determined in a summary way according to the provisions of this Act: Provided always that, except as in this Act provided, the Court shall not have cognizance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market, or franchise, shall be in question, or for any libel or slander, or for seduction, or breach of promise of marriage."

Sect. 61: "In any action in which the title to any corporeal or incorporeal

hereditament, or to any toll, fair, market, or franchise, shall incidentally come in question, the judge shall have power to decide the claim which it is the immediate object of the action to enforce, if both parties at the hearing shall consent in any writing signed by them or their solicitors to the judge having such power; but the judgment of the Court shall not be evidence of title between the parties or their privies in any other action or matter in that Court, or in any other Court; and such consent shall not prejudice or affect any right of appeal of either of the parties to such first mentioned action."

Sect. 69: "Where any action or matter is pending in the Chancery Division of the High Court which might have been commenced in a Court under this Act, it shall be lawful for any of the parties thereto to apply at chambers to the judge of the said Division to whom the said action or matter is attached to have the same transferred to the Court or one of the Courts in which the same might have been commenced, and such judge shall have power upon such application, or without such application, if he shall think fit, to make an order for such transfer, and thereupon such action or matter shall be carried on in the Court to which the same shall be ordered to be transferred, and the parties thereto shall have the same right of appeal as they would have had if the action or matter had been commenced in such Court."

Sect. 114: "Whenever an action or matter is commenced over which the Court has no jurisdiction, the Court shall, unless the parties consent to the Court having jurisdiction, order it to be struck out, and shall have power to award costs in the same manner, to the same extent, and recoverable in the same manner, as if the Court had jurisdiction therein, and the plaintiff had not appeared, or had appeared and failed to prove his demand or complaint."

Sect. 124: "No judgment or order of any judge, nor any action or matter brought before him or pending in his Court, shall be removed by appeal, motion, certiorari, or otherwise, into any other Court whatever, save and except in the manner and according to the provisions in this Act mentioned."

Sect. 126: "It shall be lawful for the High Court or a judge thereof to order the removal into the High Court, by writ of certiorari or otherwise, of any action or matter commenced in the Court under the provisions of this Act, if the High Court or a judge thereof shall deem it desirable that the action or matter shall be tried in the High Court, and upon such terms as to payment of costs, giving security, or otherwise as the High Court or a judge thereof shall think fit to impose."

W. H. G.

1912
April 26.

MARTIN *v.* THE GREAT EASTERN RAILWAY COMPANY.

Railway—Fire caused by Sparks from Engine—Damage to Agricultural Crops —"Particulars of damage" within Fourteen Days—Amount of Claim in Money—Railway Fires Act, 1905 (5 *Edw.* 7, *c.* 11), *ss.* 1, 3.

By s. 1, sub-s. 1, of the Railway Fires Act, 1905, when damage is caused to agricultural land or to agricultural crops by fire arising from sparks or cinders emitted from any locomotive engine used on a railway, the fact that the engine was used under statutory powers shall not affect liability in an action for such damage; and by sub-s. 3, the section shall not apply in the case of any action for damage unless the claim for damage in the action does not exceed 100*l*. By s. 3, "This Act shall not apply in the case of any action for damage by fire brought against any railway company unless notice of claim and particulars of damage, in writing, shall have been sent to the said railway company within seven days of the occurrence of the damage as regards the notice of claim, and within fourteen days as regards the particulars of damage":—

Held, that the "particulars of damage" required by s. 3 to be sent to the railway company must contain a statement of the amount of the claim in money.

TRIAL of action before Channell J. without a jury.

The statement of claim alleged that on July 22, 1911, and again on August 2, 1911, damage was caused to agricultural land and crops belonging to the plaintiff by fire arising from sparks or cinders emitted from locomotive engines used on the defendants' railway adjoining the said land; by the first fire, between seven and eight acres of barley being burnt in a field called Common Field, and by the second fire a further area of about four acres of barley in the same field being burnt. The plaintiff claimed 60*l*., the value of the barley burnt.

The defendants in the defence admitted the allegations of fact set out in the statement of claim; they alleged that at the time of the damage they were acting in the due exercise of their statutory powers and without negligence; and they further stated that in so far as the plaintiff intended to rely upon the Railway Fires Act, 1905 (1), they would contend that the

(1) 5 Edw. 7, c. 11, s. 1:

"(1.) When, after this Act comes into operation, damage is caused to agricultural land or to agricultural crops, as in this Act defined, by fire arising from sparks or cinders

plaintiff had failed to comply with the requirements of s. 3 of that Act, and that the Act had no application, in that the notices which the plaintiff sent to the defendants on July 26 and August 4, after the respective fires, were defective in not stating the amount of the damage claimed in money, and that the notice of July 26 was further defective in that the amount of land affected or damaged and the extent of such affection or damage were not stated therein with sufficient precision or exactness, and that in consequence the plaintiff had no remedy in law against the defendants.

The notices referred to in the defence were the following.

On July 26, 1911, the plaintiff sent the following letter to the defendants:—

"I beg to give you notice that on Saturday last, July 22nd, some considerable damage was done by fire to a field of barley known as Common Field of about 24 acres, and some of my men saw smoke and fire between 1 and 2 P.M. just after one of your trains had passed.

"I estimate the quantity of land affected between seven and eight acres, some of it being entirely destroyed and some portion partially only.

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emitted from any locomotive engine used on a railway, the fact that the engine was used under statutory powers shall not affect liability in an action for such damage.

". . . . .

"(3.) This section shall not apply in the case of any action for damage unless the claim for damage in the action does not exceed one hundred pounds."

Sect. 3: "This Act shall not apply in the case of any action for damage by fire brought against any railway company unless notice of claim and particulars of damage, in writing, shall have been sent to the said railway company within seven days of the occurrence of the damage as regards the notice of claim, and within fourteen days as regards the particulars of damage."

Sect. 4: "In this Act—

"The expression 'agricultural land' includes arable and meadow land and ground used for pastoral purposes or for market or nursery gardens, and plantations and woods and orchards, and also includes any fences on such land, but does not include any moorland or buildings;

"The expression 'agricultural crops' includes any crops on agricultural land, whether growing or severed, which are not led or stacked;

". . . . ."

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"Should you send an inspector please let me know so that I may be at home to meet him."

On August 4 the plaintiff sent the following letter to the defendants:—

"I wrote to you on July 26th respecting a field of barley that was set on fire by one of your trains between 1 and 2 P.M., and have not yet had a reply, and since then a train of yours, 4.42 out of Cambridge on Wednesday, August 2nd, has set fire to some more and entirely burnt about four acres. I shall be glad to hear from you respecting this."

It was agreed that the damage to the barley caused by the first fire was 44*l.*, and the damage caused by the second fire was 16*l.* No evidence was called at the trial, the plaintiff relying upon the provisions of the Railway Fires Act, 1905.

A. H. Chaytor, for the plaintiff. It is not necessary to state in the particulars of damage sent within fourteen days after the fire the amount of the claim in money. The expression used in s. 3 of the Railway Fires Act, 1905, is "particulars of damage," not "particulars of the damages." Throughout the Act, both in the title and in the enacting part, the word "damage" is used to indicate the injury caused to the land or crops by the fire, and the expression "particulars of damage" means a reasonable description of the physical damage done so that the railway company may know at once what the damage is and thus be enabled to verify it. It is sufficient to state the area of the damage, as for instance the number of acres burnt. "Agricultural land," by s. 4, includes plantations, woods, orchards, and fences, and in such a case it might be impossible to state within fourteen days the money amount of the damage done, as it might be impossible to say definitely within so short a time whether the trees were dead or merely scorched. Wherever in the Act a money claim is referred to it is called an "action for damage" or a "claim for damage," as in s. 1, sub-s. 1, s. 1, sub-s. 3, and s. 3. The owner of the land or crops may be away, and therefore he has seven days within which to give notice that he has a claim, and seven days more in which

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to make inquiries and to ascertain the extent of the damage. The amount of the claim in money therefore need not be stated in the particulars of damage to be given within fourteen days. That being so, the particulars contained in the letters of July 26 and August 4 are a sufficient compliance with the Act.

[CHANNELL J. Is it sufficiently definite to state, as is stated in the letter of July 26, that some of the barley was "entirely destroyed and some portion partially only"? It leaves it in doubt as to how much was entirely destroyed and how much partially.]

The letter states the number of acres affected, and that the barley is in part entirely and in part only partially destroyed, and that is sufficient particularity to satisfy s. 3 of the Act. The plaintiff is therefore entitled to recover.

Roland Oliver, for the defendants. The plaintiff must state in the particulars of damage the amount of his claim in money. The railway company are entitled to know whether the plaintiff is claiming under the Railway Fires Act, 1905, an amount not exceeding 100*l.*, or whether he is claiming a larger sum at common law, because in the former case they would at once settle the claim upon being satisfied that it was bona fide, whereas in the latter case an inquiry would be necessary as to whether the railway company were negligent in not having a proper apparatus for checking the emission of sparks from the engine or were negligent in the user of the engine. Merely to be told the acreage of the damage is not sufficient, because crops vary in quality, and plantations and woods and fences vary considerably in value. "Particulars of damage" in s. 3 mean such particulars as would be ordered in an action where the amount of the claim is ascertainable. As Bowen L.J. said in *Turnock* v. *Sartoris* (1), "In the case of a claim for damages particulars were required to enable the defendant to know (among other things) whether it was worth his while to fight the action, and how he should deal with it if he did. He could not deal with such a claim unless he knew how it sounded in money." That principle applies to particulars under this Act, and if the present particulars were given in an action further and better

(1) (1888) 33 Sol. J. 58.

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particulars would be ordered. If it is sufficient to state the area of the damage, the Legislature would not have given a further seven days after the notice of claim within which to deliver the particulars; the mere extent of the damage could be ascertained within seven days after the fire and stated in the notice of claim. This Act, which makes a railway company liable in any event up to 100*l.*, ought to be construed strictly, and if the plaintiff has not performed the conditions precedent specified in s. 3 he cannot recover. There is no provision in the Act, as there is in s. 7 of the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), and s. 2 of the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), by which the Court can disregard a defect in the notice if the defendant has not been prejudiced thereby. The particulars must shew that the claim is within the Act. The plaintiff, therefore, is not entitled to recover. Further, apart from the money claim, the particulars in the notice of July 26 are insufficient.

A. H. Chaytor in reply. The defendants must have known from the number of acres of barley burnt that the claim could not exceed 100*l.* If the damage exceeds 100*l.* the plaintiff may abandon the excess over 100*l.* and sue under the Act. In such a case the "particulars of damage," if they stated the money value of the damage, would be misleading.

CHANNELL J. In this case I have felt considerable doubt, but I have come to the conclusion that the defendants are entitled to judgment. The Railway Fires Act, 1905, alters the law which existed before that Act came into operation, and by s. 1 makes a railway company liable for damage caused to agricultural land or agricultural crops by fire arising from sparks or cinders emitted from a locomotive engine used on a railway without proof of negligence on their part, where the claim for damage in the action does not exceed 100*l.* The Act, however, only makes them liable conditionally, and s. 3 specifies certain conditions precedent to the liability under the Act arising, there being no power to waive the performance of those conditions. No question of waiver arises in this case. The Act is dealing with the bringing of an action, and it has used technical

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terms. Sect. 3 provides that "this Act shall not apply in the case of any action for damage by fire brought against any railway company unless notice of claim and particulars of damage, in writing, shall have been sent to the said railway company within seven days of the occurrence of the damage as regards the notice of claim, and within fourteen days as regards the particulars of damage." That section distinguishes between two things, notice of claim which is to be given within seven days and particulars of damage which are to be given within fourteen days. Greater particularity is therefore required in the particulars of damage than in the notice of claim. I am inclined to think that the Legislature in using the expression "particulars of damage" in connection with the words "any action for damage by fire brought against any railway company" intended to indicate that the particulars must be of the nature of particulars in an action. If that is the true view, the particulars must state what is the amount of the claim in money. One of the main objects of the particulars is to inform the railway company whether the claim made against them is such as to bring the case within the Act, for if it is within the Act there is no need for an inquiry as to what engine caused the fire and as to whether the engine was fitted with an efficient mechanical appliance for preventing, as far as possible, the emission of sparks—an inquiry which might involve very considerable expense—or whether there was any negligence in the user of the engine. Bowen L.J. said in *Turnock* v. *Sartoris* (1) particulars were required in the case of a claim for damages to enable the defendant to know (among other things) whether it was worth his while to fight the action, and how he should deal with it if he did; and he could not deal with such a claim unless he knew how it sounded in money. The alternative view put forward by the plaintiff is that it is sufficient for the particulars to state what is the physical damage caused by the fire, for instance the number of acres of wheat or barley which have been damaged. The particulars obviously must state something more than that stated in the notice of claim, because a further seven days are allowed for sending the particulars of damage, from which I should infer that the

(1) 33 Sol. J. 58.

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particulars must contain something which requires a little longer time to ascertain than the mere measurement of the damage. If the particulars of damage need only state the physical damage done, I do not see why it could not be ascertained within seven days after the fire, and why therefore the Legislature gave a further period of seven days within which to ascertain it. The section seems to me to require the plaintiff to state in the particulars what is his claim in money. That is sufficient to dispose of the action.

It is not necessary therefore to consider whether, if I am wrong in my view that the money claim must be stated, the two letters of July 26 and August 4 were sufficient in other respects. If it were necessary for me to express an opinion upon that point, I should say that the particulars contained in the second letter are reasonably sufficient, but not in the first.

There must therefore be judgment for the defendants.

Judgment for defendants.

Solicitors for plaintiff: *Coward & Hawksley, Sons & Chance.*
Solicitors for defendants: *Devonshire, Monkland & Co.*

W. F. B.

THE KING *v.* JUSTICES OF THE PARTS OF LINDSEY, LINCOLNSHIRE.

1912
May 1.

*Justices—Poor Rate—Non-payment—Issue of Distress Warrant—Levy—Appeal to Quarter Sessions—"Order of a Court of summary jurisdiction"—Procedure on Appeal—Recognizance—*17 *Geo.* 2, *c.* 38, *s.* 7—*Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 31, *sub-s.* 3—*Summary Jurisdiction Act*, 1884 (47 & 48 *Vict. c.* 43), *ss.* 6, 7.

An appeal to quarter sessions under s. 7 of 17 Geo. 2, c. 38, by a person aggrieved by a distress for non-payment of a poor rate is not an appeal from an "order" of a Court of summary jurisdiction within s. 31 of the Summary Jurisdiction Act, 1879, and the appeal is, therefore, not subject to the conditions and regulations prescribed by that section.

Reg. v. *London Justices* [1899] 1 Q. B. 532, applied.

Rule Nisi for a mandamus to quarter sessions for the Parts of Lindsey, Lincolnshire, to hear and determine an appeal.

A warrant of distress was issued by justices for the seizure of the goods of one Bower for non-payment of a poor rate and special expenses rate. The distress was levied. Bower gave notice of appeal to quarter sessions, but the quarter sessions refused to hear the appeal and ordered the appellant to pay the costs, on the ground that the appellant had not complied with the provisions of s. 31, sub-s. 3, of the Summary Jurisdiction Act, 1879, in that he had entered into recognizances before he had given notice of his appeal. The appellant then obtained this rule nisi on the ground that the appeal was not an appeal to which s. 31 of the Summary Jurisdiction Act, 1879, applied, but was an appeal under s. 7 of 17 Geo. 2, c. 38 (1), and that under that section it was not necessary for an appellant to enter into recognizances.

(1) 17 Geo. 2, c. 38, s. 7: "And for the more effectual levying money assessed for the relief of the poor, be it enacted by the authority aforesaid, that the goods of any person assessed, and refusing to pay, may be levied by warrant of distress, ...; and if any person shall find him or herself aggrieved by such distress as aforesaid, it shall and may be lawful for such person to appeal to the next general or quarter sessions of the peace for the county or precinct where such assessment was made, and the justices there are hereby required to hear and finally determine the same."

Summary Jurisdiction Act, 1879

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C. E. Dyer, for the overseers, shewed cause against the rule. By s. 7 of the Summary Jurisdiction Act, 1884, the definition of a Court of summary jurisdiction was extended to include justices "whether acting under the Summary Jurisdiction Acts or any of them or under any other Act." That section was repealed but re-enacted by s. 13, sub-s. 11, of the Interpretation Act, 1889. Justices when sitting to issue a distress warrant for non-payment of a poor rate are acting not merely ministerially but judicially, and are, since the Act of 1884, a Court of summary jurisdiction. It follows that the appeal to quarter sessions which is given by s. 7 of 17 Geo. 2, c. 38, is an appeal from a Court of summary jurisdiction, and by s. 6 of the Summary Jurisdiction Act, 1884, the conditions and regulations prescribed by s. 31, sub-s. 3, of the Summary Jurisdiction Act, 1879, in the case of appeals to quarter sessions must be duly observed, otherwise the appeal cannot be heard: *Reg.* v. *Lord Mayor of London* (1); *Fourth City Mutual Building Society* v. *Churchwardens of East Ham.* (2) *Reg.* v. *Price* (3), which at first sight seems opposed to this contention, is not really in point, for the only decision in that case was that the Summary Jurisdiction Act, 1879, does not affect the procedure for the recovery of poor rates; but the entering into recognizances for the purpose of an appeal is no part of that procedure.

[AVORY J. Was there in this case an appeal from an "order" of a Court of summary jurisdiction within the meaning of s. 31 of the Summary Jurisdiction Act, 1879?]

Yes. It was held in *Reg.* v. *London Justices* (4) that an appeal will not lie against the issue of a distress warrant for poor rate before the distress has been levied, but when, as in this case, the

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(42 & 43 Vict. c. 49), s. 31: "Where any person is authorised by this Act or by any future Act to appeal from the conviction or order of a Court of summary jurisdiction to a Court of general or quarter sessions, he may appeal to such Court, subject to the conditions and regulations following:

"(3.) The appellant shall within the prescribed time, or if no time is prescribed within three days after the day on which he gave notice of appeal, enter into a recognizance before a Court of summary jurisdiction . . . ."

(1) (1887) 57 L. T. (N.S.) 491.
(2) [1892] 1 Q. B. 661.
(3) (1880) 5 Q. B. D. 300.
(4) [1899] 1 Q. B. 532.

distress has been levied the appeal is against the order of the justices for the issue of the distress warrant. The levy is only the machinery for carrying out that order. It was decided in *Reg.* v. *Cheshire Justices* (1) that entering into recognizances before giving notice of appeal is not a compliance with s. 31, sub-s. 3, of the Summary Jurisdiction Act, 1879. Quarter sessions, therefore, rightly held that there was no jurisdiction to hear this appeal. [He also referred to *Harper* v. *Carr* (2); *In re Allen* (3); *Boulter* v. *Kent Justices* (4); *Atkins* v. *Hutton* (5); *Southwark and Vauxhall Water Co.* v. *Hampton Urban District Council* (6); *Seaman* v. *Burley.* (7)]

Konstam, in support of the rule. In both *Reg.* v. *Lord Mayor of London* (8) and *Fourth City Mutual Building Society* v. *Churchwardens of East Ham* (9) the question was as to the power of a Court of summary jurisdiction to state a special case. Under s. 33, sub-s. 1, of the Summary Jurisdiction Act, 1879, "any person aggrieved who desires to question a conviction, order, determination, or other proceeding of a Court of summary jurisdiction" may apply for a special case. The language of that section is far wider than that of s. 31 which deals with appeals to quarter sessions from a "conviction or order." Those cases are, therefore, no authority on the question in this case. The appeal under s. 7 of 17 Geo. 2, c. 38, is not an appeal against an order, but against the distress: *Reg.* v. *London Justices* (10); and therefore, even assuming it is correct to say that justices when issuing a distress warrant are acting as a Court of summary jurisdiction, there is in this case no appeal against an order within the meaning of s. 31 of the Summary Jurisdiction Act, 1879. The act of the justices in issuing a distress warrant is in truth not an order in any sense of the word.

[He was stopped.]

LORD ALVERSTONE C.J. In this case several questions have been discussed by Mr. Dyer in the course of his argument which in

(1) (1896) 60 J. P. 585.
(2) (1797) 7 T. R. 270.
(3) [1894] 2 Q. B. 924.
(4) [1897] A. C. 556.
(5) (1909) 103 L. T. 514.
(6) [1899] 1 Q. B. 273.
(7) [1896] 2 Q. B. 344.
(8) 57 L. T. (N.S.) 491.
(9) [1892] 1 Q. B. 661.
(10) [1899] 1 Q. B. 532.

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my view it is not necessary to decide, and I desire to confine my judgment to the one point which turns on the particular procedure applicable to appeals to quarter sessions under s. 7 of 17 Geo. 2, c. 38. By that section a special right of appeal to quarter sessions is given to any person who finds himself aggrieved by a distress levied for non-payment of poor rates. It is contended by Mr. Dyer that the effect of s. 7 of the Summary Jurisdiction Act, 1884, and of certain decisions of this Court is that justices when sitting to issue a distress warrant are now a Court of summary jurisdiction, and that in the event of an appeal to quarter sessions under the Act of George II. the provisions of s. 31, sub-s. 3, of the Summary Jurisdiction Act, 1879, as to entering into recognizances must be observed. I do not propose to express any opinion as to whether the contention that justices acting in these circumstances are a Court of summary jurisdiction is well founded, because it is not necessary for the purposes of this case to decide that, and we have not heard any argument on that question from counsel on the other side. Sect. 31 of the Act of 1879 deals with appeals to quarter sessions "from the conviction or order of a Court of summary jurisdiction." Therefore, unless this appeal is an appeal from an "order" within the meaning of that section, it is clear that the appeal is one to which s. 31 has no application at all. It is, I think, material to note in passing that s. 33, which deals with the stating of special cases, uses far wider language than s. 31, for s. 33 speaks of "a conviction, order, determination, or other proceeding of a Court of summary jurisdiction." The case of *Reg.* v. *London Justices* (1) shews clearly that the appeal under s. 7 of 17 Geo. 2, c. 38, is not an appeal against an order of justices, but against the distress, and that being so, it is not an appeal against an "order" of a Court of summary jurisdiction within s. 31 of the Act of 1879, and, therefore, the appellant is not bound to observe the formalities as to entering into recognizances required by sub-s. 3 in the case of appeals to which s. 31 applies. So far as I am aware it never was the practice to require recognizances in the case of an appeal under s. 7 of 17 Geo. 2, c. 38, and it would in my opinion require an enactment in the clearest language to bring those

(1) [1899] 1 Q. B. 532.

particular appeals within the general provisions of s. 31 of the Act of 1879. The argument in support of the decision of quarter sessions therefore fails, and it becomes unnecessary to discuss the authorities cited with reference to the stating of special cases or to consider whether there is any conflict between *Reg.* v. *Lord Mayor of London* (1) and *Reg.* v. *Price.* (2) The rule must be made absolute and the order of quarter sessions condemning the appellant in costs must be quashed.

PICKFORD J. I am of the same opinion. The provisions of s. 31, sub-s. 3, as to recognizances only apply to appeals from "a conviction or order of a Court of summary jurisdiction." It is not necessary to decide whether justices when sitting to issue a distress warrant for non-payment of a poor rate are a Court of summary jurisdiction, or whether their act in issuing the distress warrant is an order, for it has been decided in *Reg.* v. *London Justices* (3) that the appeal authorized by s. 7 of 17 Geo. 2, c. 38, is an appeal against the distress and that there is no right of appeal unless the distress has been actually levied. There is, therefore, in my opinion no appeal in the present case against any order, and the case is entirely outside s. 31 of the Act of 1879.

AVORY J. I am of the same opinion. The contention which succeeded at quarter sessions can only be made good by the combined operation of s. 6 of the Summary Jurisdiction Act, 1884, and s. 31 of the Act of 1879. Sect. 6 provides that: "Where a person is authorized by any Act passed before the commencement of the Summary Jurisdiction Act, 1879, to appeal from the conviction or order of a Court of summary jurisdiction made in pursuance of the Summary Jurisdiction Acts . . . . he shall after the passing of this Act appeal to such Court subject to the conditions and regulations contained in the Summary Jurisdiction Act, 1879, with respect to an appeal to a Court of general or quarter sessions." Therefore in order to succeed the respondents at quarter sessions, now shewing cause against the rule nisi, must satisfy us that this is a case in which a person

(1) 57 L. T. (N.S.) 491. (2) 5 Q. B. D. 300
(3) [1899] 1 Q. B. 532.

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is authorized to appeal against a conviction or order of a Court of summary jurisdiction. For the reasons already given, and applying the reasoning of *Boulter* v. *Kent Justices* (1), I am of opinion that there is not in this case any order from which the appellant was in fact appealing to quarter sessions. He was aggrieved by and was appealing from the actual distress which had been levied.

If any further authority is needed for this view it may be found in *Reg.* v. *Somersetshire Justices* (2), where an objection was taken that seven days' notice of appeal, as required by s. 31, sub-s. 2, of the Act of 1879, had not been given in the case of an order for the removal of a pauper. This Court held that s. 31 did not apply to that case, because, as Lord Coleridge C.J. said, "one line in s. 6" of the Act of 1884 "is fatal, for that section contains the words 'made in pursuance of the Summary Jurisdiction Acts,' and orders of removal are expressly excepted from the operation of the Summary Jurisdiction Acts by s. 35 of Jervis's Act, and therefore they are not within s. 6 of the Summary Jurisdiction Act, 1884." The Court in that case, therefore, applied the same principle as we are applying here. For these reasons I am of opinion that this rule must be made absolute.

Rule absolute.

Solicitors for the overseers: *Clinton & Co., for J. E. Lamb, Caistor.*

Solicitors for appellant: *Walmsley & Stansbury, for Shackles, Dunkerly & Barton, Hull.*

(1) [1897] A. C. 556. (2) (1889) 22 Q. B. D. 625.

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COWERN *v.* NIELD.

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May 9.

Contract—Infancy—Infant Trader, Goods supplied by—Failure of Consideration—Money had and received—Liability of Infant—Cause of Action ex delicto.

Where an infant trader enters into a contract for the sale of goods and is paid the price by the purchaser, but subsequently fails to deliver the goods, the purchaser cannot recover the price in an action for money had and received, even though the contract was for the infant's benefit, unless it can be proved that in substance the cause of action arose ex delicto.

Bristow v. *Eastman* (1794) 1 Esp. 172, followed.

DEFENDANT'S appeal from the Wolverhampton County Court.

The defendant, who was an infant, carried on business as a hay and straw merchant. The plaintiff ordered some clover and hay from the defendant and sent to the defendant a cheque for 35*l.* 19*s.* in payment. The clover was sent to the plaintiff, but he refused to take delivery on the ground that the clover was in a bad condition. The defendant never delivered or tendered any of the hay. The plaintiff brought this action to recover 35*l.* 19*s.* as damages for a breach of contract or alternatively as money paid on a consideration which had failed. The defendant pleaded infancy.

The county court judge gave judgment for the plaintiff, holding that on the facts the plaintiff was entitled to reject the clover, and with regard to the plea of infancy, that as the defendant was carrying on a trade the contract was for his benefit and that infancy was therefore no defence.

The defendant appealed.

Douglas Hogg, for the defendant. The finding of the county court judge that the contract was for the benefit of the defendant does not make it enforceable against him. It was held in *Thornton* v. *Illingworth* (1) that infants' trading contracts were absolutely void at common law, not voidable only. Whether that

(1) (1824) 2 B. & C. 824.

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decision correctly stated the law as at that date or not, it is clear that since the Infants Relief Act, 1874, infants' trading contracts are wholly void. In *Ex parte Jones* (1) Jessel M.R. said: "The words of s. 1 of that Act are perfectly general, and they apply to all contracts of an infant except those which are expressly excepted, and they cannot be restricted so as not to apply to trade debts"; and accordingly the Court held that an infant trader could not be made bankrupt in respect of money owing by him for goods supplied to him in his business, because he was not a debtor. A person who deals with an infant trader does so at his peril, unless the infant misrepresents himself to be of full age.

[PHILLIMORE J. Can the infant in this case retain both the goods and the money? Will not an action lie for money had and received to the plaintiff's use?]

No, because the action would be based on a contract which cannot be enforced. If an action for money had and received would lie in this case it would equally lie in the case of an infant who had received money as a loan and had failed to repay it, but s. 1 of the Infants Relief Act, 1874, clearly prevents such an action as that.

Merlin, for the plaintiff. Sect. 1 of the Infants Relief Act, 1874, deals only with contracts for the supply of goods to an infant, as was the case in *Ex parte Jones*. (2) The Act does not apply to contracts for the supply of goods by an infant, which are left in the same position as they were before the Act. The present case must therefore be decided according to the principles of common law applicable to infants' contracts. The county court judge has rightly found, and it is a finding of fact, that this contract was for the defendant's benefit. At common law any contract which was for the benefit of an infant was enforceable against him. For example, in *Earl of Buckinghamshire* v. *Drury* (3) it was decided by the House of Lords that an infant widow who had been a party to a marriage settlement under which a jointure was granted to her during widowhood was not entitled to elect to waive her annuity and take her dower out of her deceased husband's

(1) (1881) 18 Ch. D. 109, at p. 122. (2) 18 Ch. D. 109.
(3) (1761) 2 Eden, 60.

real estate. So also in *Chapple* v. *Cooper* (1) an infant widow was held liable upon her contract to pay for her deceased husband's funeral, because the contract was considered to be for her personal benefit. It was just as much for the benefit of the defendant in the present case that he should carry on trade as that he should enter into an apprenticeship or a contract of service: *Evans* v. *Ware*. (2) The highest that the case can be put against the plaintiff is that the contract was not void but voidable at the election of the defendant: see *Bruce* v. *Warwick* (3), where Gibbs C.J. said that an infant's trading contract "is in the same case as other contracts made by an infant, which he may either avoid or enforce at his pleasure." The defendant never has avoided this contract, and, being for his benefit, it is therefore enforceable against him. In any event an action will lie in the circumstances of this case for money had and received. There has been a total failure of consideration. The hay was never delivered and the clover was taken back. The defendant will not be permitted to keep both the money and the goods. In *Esron* v. *Nicholas* (4) the guardian of an infant, with the infant's assent, granted a lease for which a premium was paid; the infant on attaining his majority granted a new lease of the same land to another lessee. On a bill by the first lessee to have his lease confirmed or the premium refunded the Court decreed the latter alternative. In *Bristow* v. *Eastman* (5) it was held by Lord Kenyon that an action for money had and received will lie against an infant to recover money which he had embezzled. It is true that Lord Kenyon based his decision on the fact that that case was in substance an action ex delicto, but there was evidence in the present case that the contract was in fact induced by fraud on the part of the defendant, and the plaintiff is at least entitled to have a new trial on that ground. [He also referred to *Maddon* v. *White* (6); *Zouch* v. *Parsons* (7); *Magauran* v. *Jamieson* (8); *In re Seager* (9); *Corpe* v. *Overton* (10); *Thurstan* v. *Nottingham Permanent*

(1) (1844) 13 M. & W. 252.
(2) [1892] 3 Ch. 502.
(3) (1815) 6 Taunt. 118.
(4) (1733) 1 De G. & Sm. 118, n.
(5) 1 Esp. 172.
(6) (1787) 2 T. R. 159.
(7) (1765) 3 Burr. 1794.
(8) (1818) 2 Molloy's Ir. Ch. Rep. 520.
(9) (1889) 60 L. T. 665.
(10) (1833) 10 Bing. 252.

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Benefit Building Society (1); *Kirton* v. *Eliot* (2); *Clements* v. *London and North Western Ry. Co.*(3); *Madox* v. *Eden* (4); *Roberts* v. *Gray* (5); Pollock on Contracts, 8th ed., pp. 69, 70.]

Hogg replied.

PHILLIMORE J. In this case the plaintiff brought an action in the county court for damages for breach of contract, and, alternatively, for money paid to the defendant on a consideration which had wholly failed.

The plaintiff's case was that he had ordered some hay and clover from the defendant, that the hay had never been delivered and that he refused to take delivery of the clover because it was rotten, and he sought to recover from the defendant the proceeds of a cheque which he had given to the defendant in payment for the hay and clover. The defendant contested the claim on the merits, and also pleaded infancy. The county court judge found as a fact on the evidence that the plaintiff was entitled to reject the clover; and with regard to the defence of infancy he held that as the defendant was carrying on business the contract was for his benefit, and that the defendant was, therefore, liable to repay to the plaintiff the money which the plaintiff had paid to him for the hay and clover. The question is whether the county court judge was right in so deciding.

It is no doubt correct to say, in a general sense, that contracts of a certain character are enforceable against an infant if they are for his benefit, but an infant is not necessarily liable on a contract merely because it is for his benefit. I am satisfied from the authorities which have been cited to us that the only contracts which, if for the infant's benefit, are enforceable against him are contracts relating to the infant's person, such as contracts for necessaries, food, clothing, and lodging, contracts of marriage, and contracts of apprenticeship and service. In my opinion a trading contract does not come within that category. Counsel for the defendant contended that at common law all contracts which were for the benefit of an infant were enforceable against him, and

(1) [1902] 1 Ch. 1.
(2) (1613) 2 Bulst. 69; S. C. sub nom. *Ketley's Case*, 1 Brownl. 120.
(3) [1894] 2 Q. B. 482.
(4) (1796) 1 Bos. & P. 480.
(5) (1912) 28 Times L. R. 387.

he referred to *Earl of Buckinghamshire* v. *Drury* (1) as an example of a further class of contract which comes within the rule, namely, a contract arising out of marriage by which an infant wife can bind herself. I doubt very much whether the decision in that case turned on the law of contract at all. The Lord Chancellor (Lord Henley, afterwards created Earl of Northington) thought that the statute of 27 Hen. 8 which introduced jointures extended to adult women only, and that an infant widow might therefore waive her jointure and claim dower. The decision of the Lord Chancellor was reversed by the House of Lords, but both the Earl of Hardwicke and Lord Mansfield, while deciding that the infant widow, having the provision stipulated for her by her marriage articles, was precluded from claiming dower, expressly refrained from basing their decision on the ground of contract. They decided the case on a different ground, namely, that it was part of the recognized practice on marriage to give the wife a jointure, and that the statute of 27 Hen. 8 did apply to infants as well as to adults. The Act of 18 & 19 Vict. c. 43 recites that "great inconveniences and disadvantages arise in consequence of persons who marry during minority being incapable of making settlements of their property," and proceeds to enact that infants may with the approval of the Court of Chancery make valid marriage settlements. That recital seems conclusive as to the law on this branch of the subject and to dispose of the suggestion as to there being a particular class of contract binding an infant wife. Infants, therefore, are not liable ex contractu, except in the cases I have mentioned, but they always have been liable ex delicto. If an infant has acquired personal property to which he has no title an action of trover or detinue will lie against him, and in *Bristow* v. *Eastman* (2), which was an action against an infant for money had and received which he had embezzled, and which has, I think, an important bearing on the present case, Lord Kenyon said that " he was of opinion that infancy was no defence to the action; that infants were liable to actions ex delicto, though not ex contractu; and though the present action was in its form an action of the latter description, yet it was of

(1) 2 Eden, 60. (2) 1 Esp. 172.

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the former in point of substance." That proposition, which is supported by the authority of Kay J. in *In re Seager* (1), shews that an action for money had and received can be maintained against an infant if the substance of the action is that the infant has obtained the money ex delicto. If, therefore, the plaintiff can prove in the present case that the defendant obtained his money by fraud the action can be maintained. I do not think it is necessary to go through all the cases that were referred to in the argument, for none of them shews more than that on certain personal contracts an infant is liable if the contract is for his benefit, and that there are certain contracts on which, if approbated by the infant after he comes of age, he may sue or be sued.

For these reasons I am of opinion that this appeal must be allowed, but we think that the case ought to go back for a new trial in order that the plaintiff may have an opportunity of proving, if he can, that his money was obtained from him by the defendant by fraud.

BRAY J. I am of the same opinion. The county court judge has found that the contract was for the infant's benefit, and has held as a matter of law that the action is, therefore, maintainable. I think his decision was wrong. It is true that there are certain contracts which, if they are for the infant's benefit, can be enforced against him; and it is said this trading contract was for the benefit of the infant because it was for the benefit of the infant that he should learn how to carry on a trade. But in my opinion there is no authority for saying that a trading contract, even if for the benefit of the infant, is an exception to the rule that an infant is not, except in certain cases, liable on contracts made by him.

Then it was said that in the circumstances of this case there was a right of action for money had and received, and a case was cited in which it was held that, though the action was in form an action ex contractu, the substance must be looked at, and if in substance the action really was ex delicto, it was maintainable. I agree with my brother Phillimore that there ought to be a new

(1) 60 L. T. 665.

trial in order that the plaintiff may have an opportunity of proving, if he can, that this action in substance arises ex delicto.

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Appeal allowed. New trial ordered.

Solicitors for plaintiff: *G. R. Thorne, Robinson & Co., for Thorne & Haslam, Wolverhampton.*

Solicitors for defendant: *Waterhouse & Co., for Sherratt & Nelson, Kidsgrove.*

F. O. R.

LEES, APPELLANT *v.* LOVIE, RESPONDENT.

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May 18.

Licensing Acts—Club—Club requiring Registration—"Unregistered Club"—Club struck off Register—Re-registration of same Club—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 & 1 *Geo.* 5, *c.* 24), *ss.* 92, 93, 95.

A club which has been struck off the register of clubs by an order of a Court of summary jurisdiction, under s. 95 of the Licensing (Consolidation) Act, 1910, cannot again be registered under the Act as a club.

CASE stated by justices.

The appellant was convicted and fined for having supplied intoxicating liquor to a member upon the premises of an unregistered club, the Willesden Radical Club, contrary to s. 93 of the Licensing (Consolidation) Act, 1910.

The Willesden Radical Club was in January, 1903, placed upon the register of clubs under the provisions of the Licensing Act, 1902. It remained upon the register until April 21, 1910, when a Court of summary jurisdiction ordered that the club should be struck off the register and that the premises should not be used for the purpose of any club requiring registration under the Licensing Act, 1902, for a period of six months. Upon an appeal to quarter sessions the period of disqualification was reduced to three months.

In January, 1911, application was made to the clerk to the justices to enter the same club upon the register of clubs, and a return was made and the proper fee tendered in intended compliance with the provisions of s. 92 of the Licensing (Consolidation)

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Act, 1910. (1) In April, 1911, the clerk entered the club upon the register, dating the entry as of January 5, 1911, and at the same time wrote to the secretary of the club stating that in his opinion the club could not legally be re-registered, but his duties were merely ministerial. The premises of the club were the same premises as at the time when the club was struck off the register.

On May 4, 1911, the appellant supplied intoxicating liquor to a member on the premises of the club, and was convicted and fined for so doing, the justices being of opinion that the Act did not permit the re-registration of a club which had been lawfully struck off the register, and that there had been no effective or lawful registration of the club within the Act.

(1) 10 Edw. 7 & 1 Geo. 5, c. 24, s. 91: "The secretary of every club which occupies a house or part of a house which is habitually used for the purposes of a club, and in which any intoxicating liquor is supplied to members or their guests, or any other premises which are habitually so used and in which any intoxicating liquor is so supplied, shall cause the club to be registered in manner provided by this Act."

Sect. 93: "If any intoxicating liquor is supplied or sold to any member or guest on the premises of an unregistered club, the person supplying or selling the liquor . . . . shall be liable to imprisonment . . . . or to a fine . . . ."

Sect. 95, sub-s. 1: "Where a club has been registered in pursuance of this Act, a Court of summary jurisdiction on complaint in writing by any person may, if they think fit, make an order directing the club to be struck off the register on all or any of the following grounds, namely:—

"(*a*) that the club has ceased to exist, or that the number of members is less than twenty-five; or . . . .

"(*f*) that the club occupies premises in respect of which, within twelve months next preceding the formation of the club, a justices' licence has been forfeited or the renewal of a justices' licence has been refused, or in respect of which an order has been made that they shall not be used for the purposes of a club."

Sub-s. 4: "Where the Court make an order striking a club off the register the Court may, if they think fit, by that order further direct that the premises occupied by the club shall not be used for the purposes of any club which requires to be registered under this Act for a specified period, which may extend, in case of a first order, to twelve months, or, in case of a second or subsequent order, to five years:"

Sect. 110: "In this Act, unless the context otherwise requires,—

"The expression 'unregistered club' means a club which requires to be registered under this Act, but is not so registered, or which has been struck off the register of clubs."

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Scott-Fox, K.C., and *T. Cuthbertson*, for the appellant. There is nothing at all in the provisions of the Licensing (Consolidation) Act, 1910, relating to clubs to indicate that a club which has been struck off the register may not again be registered. The provisions of s. 92, sub-s. 4, as to the registration of a "new" club apply to any club which is not when it applies for registration a club on the premises of which intoxicating liquor is supplied, and they apply to this club. Sect. 110, when it defines an "unregistered club" as being a club which has been struck off the register, means a club which has been struck off and has not been reinstated on the register. Among the grounds upon which a club may be struck off the register is the fact that the number of its members has become less than twenty-five, and it would be absurd to say that a club which has temporarily been so reduced in its membership and struck off for that reason may never again be registered although its membership may subsequently have largely increased. The intention of the Act as to disqualification is expressed by the provisions in sub-s. 4 of s. 95 as to the disqualification of club premises for a limited time, and there is nothing to shew an intention to disqualify a club from being re-registered. The provisions of that sub-section as to a second order seem to refer to a second order in respect of the same club, for a closing order can only be made as part of the order striking a club off the register, and that shews that a club may be registered a second time.

Danckwerts, K.C., and *A. H. Bodkin*, for the respondent. This club was an "unregistered club" within the meaning of ss. 93 and 110 of the Act. When s. 110 says that the expression "unregistered club" means a club "which has been struck off the register of clubs" it plainly means that such a club is always an "unregistered club." If the contention of the appellant were right, it would be impossible ever to strike a club off the register effectively, for it could always register again at once and do so as often as it was ordered to be struck off. The result would be that, although an order might be made that the club should be struck off and that its premises should not be used for a club for a certain period, the club might go on using the same premises and when again ordered to be struck off for so doing re-register

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again at once. The provisions of ss. 92 and 93 as to the registration of new clubs clearly refer only to clubs which have not been before registered. The definition of "unregistered club" contained in s. 110 is to be read into s. 93 so that the latter section will read "if any intoxicating liquor is supplied or sold on the premises of an unregistered club or a club which has been struck off the register." If the contention of the appellant were right, the words in s. 110, "or which has been struck off the register," would be mere surplusage and have no meaning, for it would have been sufficient to say only "but is not so registered." The definition in s. 110 is inserted solely for the purposes of s. 93, and for that reason it specifies a club which has been struck off the register.

Scott-Fox, K.C., replied.

LORD ALVERSTONE C.J. This case is by no means free from difficulty, and the arguments on both sides are very evenly balanced, and it is impossible to deny that some rather strange results may follow whichever view we take. On the whole, however, I have come to the conclusion that this conviction was right and that the appeal fails.

In the first place it must be remembered that there is an express finding in the case that this was the same club as that which had previously been struck off the register and occupied the same premises, so that no question arises here of what I may call a fresh organization. In my opinion the Act does not contemplate re-registration of a club that has been struck off. It is to be observed that registration is practically automatic, that is to say, when under s. 91 a club desires to become a registered club it has only to fulfil the conditions of s. 92. It seems to me that, when those conditions are fulfilled, the club automatically becomes a registered club. There is no officer who can exercise a discretion as to whether a club shall be registered or not if the conditions of s. 92 are complied with. Further, there is a discretion under s. 95, and the Court of summary jurisdiction has an absolute discretion whether it will strike a club off the register or refuse to do so. That to a certain extent answers what was a very strong argument for the appellant, that it would be ridiculous if a club,

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which has become unpopular for a time so that the membership has fallen below twenty-five, should be struck off and could not be registered again if it increased to a larger number. I think that under ordinary circumstances, if there was a prospect of the club getting back its required number of members, the magistrates would not strike it off.

What we have really to decide is what is the conjoint meaning of s. 93 and s. 110. Sect. 93 creates the offence of supplying intoxicating liquor on the premises of an unregistered club, and s. 110 in its last clause contains these words: "The expression 'unregistered club' means a club which requires to be registered under this Act, but is not so registered, or which has been struck off the register of clubs." There is a good deal in the view suggested by Mr. Scott-Fox that probably the framer of that clause was not thinking of what would be the consequences if a club once struck off could never again become a registered club. But the words are, in my opinion, too strong for us to adopt any other construction; they are quite general, and I do not see why the first part should not apply to a club which has never been registered and the last part have been inserted with the view of preventing a club which has been struck off ever again becoming a registered club. It is a heavy punishment, no doubt, but having regard to the fact that there is no provision for re-registration, and that there is a statement that a club which has been struck off is an "unregistered club," and that the only section in which the question of unregistered clubs is of any importance is s. 93, on the whole I come to the conclusion that the respondent's contention is right, and that it was intended that if a club has so conducted itself that the justices have taken it off the register under s. 95 it is not to become a registered club again. The fact that the justices may add to an order striking the club off the register a provision that the premises shall not be used for a limited time for the purpose of any club requiring registration rather supports the same view, because if the club could get registered again directly and the magistrates do not make an order that the premises shall not be used, as they need not do, for a limited time, then the club can practically at once become a registered club again. Therefore,

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balancing the arguments on the one side and the other, I come to the conclusion that it was intended in the Acts of 1902 and 1910 to treat it as a punishment that the provisions of s. 93 against supplying intoxicating liquor on the premises of an unregistered club should apply to every club which has been struck off the register. It may have been thought that when a club has so conducted itself that the magistrates have thought fit to strike it off, it ought to be treated as a club which is an unregistered club for all time. Looking at the object of these provisions, which I gather from the Act itself, and the terms of the legislation, I think that when a club has been struck off there is no discretion as to registration, and that the Act intends that a club which has been struck off shall continue, as long as it is the same club, to be an unregistered club. The appeal must be dismissed.

PICKFORD J. I am of the same opinion. I think that either construction gives rise to considerable difficulties and inconveniences, but I am much impressed by the fact that there is no provision for re-registration at all; it does not seem to be provided for in the Act. It seems to me that the action of the clerk to the justices in registering a club is merely ministerial. I do not think that he has any discretion or can consider whether he should register the club or whether he should not. Under those circumstances I cannot help thinking that, if it was intended that a club struck off should be re-registered, there would have been some provision providing conditions and circumstances under which it should be entitled to re-registration. It can hardly be supposed that the Act intended that a club which was struck off for what was an offence—because I think with one exception all the grounds for striking off in s. 95 are for offences of different descriptions—should be entitled to go the next week, or perhaps the next day, and as of right re-register itself. Without going through the other grounds with which my Lord has dealt, I agree that this appeal must be dismissed.

AVORY J. I have felt the same difficulty in arriving at the conclusion that the judgments that have just been delivered

represent the correct view of this Act. The question the magistrates had to decide on this summons was whether intoxicating liquor was supplied on the premises of an unregistered club. In fact, at the time when the liquor was sold the club was entered on the register, and the question is whether it could lawfully be so entered or whether it was nevertheless an "unregistered club" within the meaning of the Act. Turning to s. 110, I have come to the conclusion that the meaning of that definition is that clubs which have at any time been struck off the register of clubs are unregistered clubs. I am also influenced in coming to this conclusion by the fact that when the justices strike a club off the register for any of the reasons which are set out in s. 95, if the argument for the appellant is right, there is apparently nothing to prevent the club from being again put formally on the register the next day, notwithstanding that the justices may have made an order, as in this case, that those same premises shall not be used for the purpose of any club for a specified period. It would be a grotesque result if the same club can be re-registered for the same premises when there is an order stating that those same premises shall not be used for the purpose of any club for a specified period. Therefore I agree that the appeal must be dismissed.

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Appeal dismissed.

Solicitors for appellant: *Marcus & Francis.*
Solicitors for respondent: *Wontner & Sons.*

J. H. W.

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May 10, 14.

CABABÉ *v.* WALTON-UPON-THAMES DISTRICT COUNCIL.

Highway—Way becoming a Highway after 1835—*Absence of Intentional Dedication by Owner—Non-compliance with Conditions of s.* 23 *of the Highway Act,* 1835 (5 *&* 6 *Will.* 4, *c.* 50)—*Whether Way repairable by Inhabitants at large.*

The provisions of s. 23 of the Highway Act, 1835, with respect to the repair of new highways are not confined in their application to highways which have become such as the result of intentional dedication by the owner of the soil.

At some date subsequent to 1835 a way, which had previously been set out in an inclosure award as a private bridle path, became a public highway, but there was no evidence to shew at what precise date, or how, or under what circumstances it became such. In the absence of evidence that the conditions of s. 23 of the Highway Act, 1835, had been satisfied:—

Held, that the way was not repairable by the inhabitants at large.

Case stated by the quarter sessions for the county of Surrey on appeal from an order of justices approving a provisional apportionment of the estimated expenses of making up a road under the Private Street Works Act, 1892.

1. The respondents, the council for the urban district of Walton-upon-Thames, on October 25, 1910, resolved "that the private street known as Cottimore Lane be sewered, levelled, metalled, channelled, and made good, under and by virtue of the Private Street Works Act, 1892, from Terrace Road for a distance of about 334 yards, and that the specification, plans, sections, estimates, and provisional apportionment prepared by the surveyor be and they are hereby approved."

2. The estimated cost of the works was 822*l.* 19*s.* 7*d.*, and the appellant as owner of the property known as Walton Grove was treated as liable to be charged in the apportionment the sum of 425*l.* 18*s.* 9*d.*

3. The appellant duly objected to the apportionment on the grounds inter alia (*a*) that the alleged street or part of a street known as Cottimore Lane was not and did not form part of a

street within the meaning of the said Act, and (*b*) that it was a highway repairable by the inhabitants at large.

4. On the hearing before the quarter sessions on April 7, 1911, the following facts were established:—

5. Cottimore Lane is a lane branching from the Kingston High Road and open to it and proceeding for a length of about a mile into the highway known as Rydens Road. At the point where it leaves the Kingston Road it is about 32 feet wide, and its average width is over 20 feet, it being in no part less than 19 feet 6 inches. The appellant is a frontager on the east side of the lane for a distance of about 334 yards starting from the Kingston Road. The land abutting on to the lane on the west side opposite to the appellant's property is bounded by a hedge and ditch. It was admitted by the respondents that the lane was now and had been since the year 1864 a highway used both by foot passengers and vehicles, but save as hereinafter may appear there was no evidence to shew how, when, or under what circumstances and at whose expense the lane was originally made or laid down.

6. The site of the said road and adjoining lands on the south-west side thereof formerly consisted of common lands, and by the Walton Inclosure Act, 1800 (39 & 40 Geo. 3, c. lxxxvi.), the said lands were directed to be enclosed. The Act empowered and required the commissioners appointed under it to set out and appoint such public and private roads and ways as they should think requisite, and by s. 22 it was enacted that after such public and private roads and ways should have been set out and made it should not be lawful for any person to use any of the roads or ways either public or private over, through, or upon any of the lands and grounds by the award intended to be divided and enclosed either on foot or with horses, carts, or carriages, but that all roads and ways over, through, and upon any such lands and grounds which should not be set out and appointed as aforesaid should be and the same were thereby declared to be for ever stopped up and extinguished and should be deemed and taken as part of the lands and grounds by the said Act directed to be divided, allotted, and enclosed, and should be divided, allotted, and enclosed accordingly. The justices found that the road in question was not

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set out or appointed as a highway, and if ever there had been any highway thereon it was stopped up and extinguished by virtue of the said provisions and award.

7. . . . .

8. By an inclosure award made under the said Inclosure Act and dated December 18, 1804, there was allotted to one Edward Peppin under the number 726 an allotment or parcel of the aforesaid common field situate in Churchfield containing 52 acres. This allotment included the portion of Cottimore Lane which was the subject of the present apportionment.

9. By the said award there was also allotted to Edward Peppin under the number 751 an allotment or parcel of waste land situate in the Lower Common and containing 56 a., 3 r., 20 p. "subject to a bridleway and footpath through part of the allotment leading into Churchfield and under the north-east side thereof into the Kingston Road to and for the use of the occupiers for ever of a farm belonging to His Majesty King George III. situate in the Lower Common." The site of this bridleway and footpath was what is now known as Cottimore Lane.

10. By a conveyance dated November 28, 1826, G. D. MacIntosh and Edward Peppin, the vendors of the land over which the said bridleway and footpath ran, sold and conveyed part of the land comprising inter alia the lands allotted to the said Edward Peppin by the award under the number 726 to Charlotte Smoult, but reserved over the site of the said bridleway a right of way for themselves, servants, and others with or without horses, cattle, or other animals, carts and other carriages as appurtenant to other lands belonging to them.

11. By a conveyance dated July 9, 1836, Charlotte Smoult sold the land to J. W. G. Spicer and reserved a right of way over the lane for all purposes in similar terms.

12. In or about the year 1864 all the land mentioned in the previous conveyances was acquired by one Alderman Sidney, and he proceeded to develop a large portion thereof as a building estate. He opened up a new road from Rydens Road which joined the private road in question about the middle of its course, and from about the same point in the private road carried another new road into a public highway known as Esher Road.

13. There were only three houses in the lane until within recent years named respectively Cottimore, Fishmore Farm, and Crown Farm, and the road was from time to time well and substantially made up and kept in sufficient repair by the owners and occupiers of the lands belonging to such houses and farms at their own expense, and in more recent times by the owners of dwelling-houses built in the lane.

14. No public money has ever been expended in the making or repairing of the said road, and there was no evidence that it was ever repaired by the inhabitants at large or by the respondents or their predecessors.

15. At the conclusion of the council's case it was submitted on behalf of the appellant that the lane, being now admittedly a highway, was at common law repairable by the inhabitants at large, and *Rex* v. *Leake* (1) was cited, and that the respondents had failed to adduce any evidence bringing the case within s. 23 of the Highway Act, 1835 (2), citing *Reg.* v. *Thomas* (3) and *Healey* v. *Batley Corporation.* (4) For the respondents it was contended that *Reg.* v. *Thomas* (3) had no application, as it was a case of a turnpike road and so subject to special statutory provisions, and that s. 23 of the Highway Act protected them. The justices took that view and overruled the submission. Upon behalf of the appellant evidence was then adduced of old inhabitants shewing that the lane had been used by the public since the year 1840 as a thoroughfare between the Kingston Road and Rydens Road for both foot passengers and vehicular traffic, but

(1) (1833) 5 B. & Ad. 469.

(2) By s. 23 of the Highway Act, 1835, "No road or occupation way made or hereafter to be made by and at the expense of any individual or private person, body politic or corporate, nor any roads already set out or to be hereafter set out as a private driftway or horsepath in any award of commissioners under an Inclosure Act, shall be deemed or taken to be a highway which the inhabitants of any parish shall be compellable or liable to repair, unless the person, body politic or corporate, proposing to dedicate such highway to the use of the public" shall give three calendar months' previous notice in writing to the surveyor of the parish of his intention to dedicate such highway to the use of the public, describing its situation and extent, and shall have made up the road to the satisfaction of the surveyor and of two justices, and obtained a certificate of the justices to that effect, and performed the other conditions of the section.

(3) (1857) 7 E. & B. 399.

(4) (1875) L. R. 19 Eq. 375.

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this was disputed on behalf of the respondents. The lane also appeared upon three maps of Surrey, one dated 1765, another 1785, and the third 1823. There were also other maps of about the same date in which it was admitted that the lane was not shewn.

16. It was further contended on behalf of the appellant that the proper legal presumption was that the lane was a highway before 1835, or that if it became so since then it had been formally dedicated.

17. The justices overruled both contentions. They found as facts upon the evidence that the road was not a public highway in 1835, and that although now a public highway it is not repairable by the inhabitants at large. They accordingly dismissed the appeal.

The questions for the opinion of the Court were:—

1. Whether on the facts as stated the respondents were entitled to rely upon s. 23 of the Highway Act, 1835.

2. Whether the justices were right upon the evidence in finding that the road or lane was not a highway repairable by the inhabitants at large.

Danckwerts, K.C., and *Cababé*, for the appellant. The question whether a highway at the present day is repairable by the inhabitants at large depends upon two considerations—(1.) whether the way was dedicated to the public before 1835; (2.) if it was not, whether it was a way to which s. 23 of the Highway Act, 1835, applied, and if yea, whether the conditions of that section were satisfied. To take the latter point first. It is admitted that since 1864 the lane has been a highway, but the case finds that there was no evidence to shew how, when, or under what circumstances it became a highway. Under those circumstances s. 23 of the Highway Act has no application. The person upon whom the section imposes the obligation of giving the notices therein mentioned and of making up the road as a condition precedent to putting the burden of repair upon the public is the "person proposing to dedicate such highway" and no one else. If there is no such person the section cannot apply. "This section," said Bacon V.-C. in *Healey* v. *Batley Corporation* (1), "has no application to the case of a person who has not

(1) L. R. 19 Eq. 375, at p. 393.

made the road at his own expense, who does not propose to dedicate the highway to the use of the public, and who does not intend or undertake to make it or to keep it in repair at his own expense for twelve months, in order at the end of that period to throw the future care and expense of the highway on the surveyor and the general rate." In *Reg.* v. *Thomas* (1) a road had been made by turnpike trustees under an Act which expired in 1848. There was evidence that the road was used by the public and repaired by the parish after the expiration of the Act, and it was held that the absence of proof of compliance with the conditions of s. 23 did not prevent its being compulsorily repairable by the parish, for that the section did not apply to such a case. Coleridge J. said: "It appears that the Legislature contemplated the case of a private person making a road for the purpose of dedicating it, or setting out a private driftway under an Inclosure Act, and not such a case as this. Neither do the words of the section embrace such a case. This is not a road made by any person or body proposing to dedicate it. It was made by turnpike trustees, who had no power to dedicate it. It was not a road made so as to bring it within s. 23, but was left to the common law. I never heard it laid down that all roads were included in the enactment in s. 23." That case is very like the present. There as here there was a way which for the first time became a highway after 1835 without any intentional dedication, and it was held to be repairable by the inhabitants at large. In *Attorney-General* v. *Watford* (2) Parker J. took the same view that s. 23 is not of universal application to all new highways and held that "it is for the inhabitants to prove that the road in question is a road to which the section applies." Prima facie every highway whether old or new is repairable by the inhabitants, and the onus is upon the local authority to shew that the highway in question forms an exception to that rule: per Jelf J., *Vyner* v. *Wirral.* (3) There seems to be a very good reason why s. 23 should be held not to apply in the absence of intentional dedication. The object of the section was to prevent the owners of building estates from laying out roads for the purpose of the development of their property and

(1) 7 E. & B. 399. (2) [1912] 1 Ch. 417.
(3) (1909) 73 J P. 242.

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then calling upon the public to repair them. As Wills J. said in *Eyre* v. *New Forest Highway Board* (1), "it having been found that . . . . people were laying out building land and laying out streets in great numbers threatening to throw additional burdens upon the public, or upon the parish as it was then, it was thought wise to put some limitation upon that." But where a road has become a highway by public user without the landowner's assent and as the result of his negligence in failing to protect his rights from encroachment, there is every reason why the inhabitants who are the parties benefiting from their encroachment should be under an obligation to repair the way, and none why that obligation should be imposed upon the owner of the soil. But even if s. 23 is to be taken to apply where there has been no intentional dedication, after a lapse of fifty years, when the witnesses who could prove the facts are probably dead, it must be presumed that the formalities of the section were duly complied with: *Leigh Urban Council* v. *King*. (2) That presumption may no doubt be rebutted, but the fact that the inhabitants have never repaired the way and that the adjoining owners have done so is not sufficient to rebut it: *Reg.* v. *Newbold* (3); *Attorney-General* v. *Watford*. (4) Secondly, the Court, who by virtue of the provisions of the Judicature Act, 1894 (57 & 58 Vict. c. 16), s. 2, sub-s. 2, are not bound by the inferences of fact drawn by the justices, ought to infer from the evidence that the lane became a highway between 1804 and 1835. The fact that the vendor of allotment No. 726 in the year 1836 reserved a private right of way over the locus in quo is not inconsistent with its also being at that time a public way. There are authorities to the effect that a public way and a private way may co-exist over the same spot at the same time.

Sir F. Low, K.C., and *W. Mackenzie*, for the respondents. What converted the private way which was set out in the inclosure award into a highway was the fact of Alderman Sidney in 1864 opening the new road from the middle of Cottimore Lane leading into Rydens Road, thereby affording direct connection between two highways, the Rydens and Kingston Roads. That was an

(1) (1892) 56 J. P. 517.
(2) [1901] 1 Q. B. 747.
(3) (1869) 17 W. R. 295.
(4) [1912] 1 Ch. 417.

act of intentional dedication. He had bought the whole of the land in the neighbourhood, including allotment 726, for the purpose of converting it into building sites; and as it was from that date that the lane became a highway, he presumably threw it open to the public with the object of developing his building estate. That is just the very class of dedication which, as Wills J. in *Eyre* v. *New Forest Highway Board* (1) pointed out, led to the passing of s. 23, and to which that section was especially intended to apply. The Court are entitled to draw the inference that such was the origin of the highway, for the finding of the justices that there was no evidence to shew what the origin was is qualified by the words "save as hereinafter may appear," and from the facts set out it does sufficiently so appear.

But even if there was no intentional dedication, that is immaterial. The provisions of s. 23 were intended to apply to all ways becoming highways after the passing of that Act, whether the public acquired their rights over them by intentional dedication or mere user. The section deals with two classes of highways, (1.) those intentionally dedicated by the persons at whose expense they were made, and (2.) driftways and horsepaths set out in an award, and it starts by providing that neither class of way, becoming a highway after 1835, shall be repairable by the inhabitants at large. Then it goes on to add a qualification as regards class 1, "unless the person body, politic or corporate . . . . proposing to dedicate" &c. But it adds no corresponding qualification with regard to class 2; therefore new highways of that class are never repairable by the inhabitants at large. If then the section applies, there was no evidence of any compliance with its requirements. It may be that the onus of proof lies in the first instance upon the highway authority, but it may be shifted (per Jelf J., *Vyner* v. *Wirral* (2)), and the finding here that for a period of nearly forty years from 1864 the repairs to the lane were from time to time done by the occupiers of the adjoining land and never by the highway authority was amply sufficient to shift on to the occupiers the onus of proving that it was repairable by the inhabitants at large.

(1) 56 J. P. 517. (2) 73 J. P. 242.

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LORD ALVERSTONE C.J. The appellant in this case is in my opinion not entitled to succeed. Speaking for myself I think there was abundant evidence upon which the justices could come to the conclusion that Cottimore Lane was not a public highway in 1835. Two maps were put in, dated respectively 1765 and 1785, which shewed a track on the site of Cottimore Lane extending right through from the Kingston Road to Rydens Road. Then the inclosure award of 1804 allotted to one Edward Peppin the allotment numbered 726, which included the site of the portion of Cottimore Lane which is now in question, and also the allotment No. 751 subject to a bridleway and footpath over the portion of the lane in 726 for the use of the occupiers of the Crown Farm. In 1826 the then owners of Nos. 726 and 751 conveyed the former to a purchaser, reserving to themselves a right of way for all purposes, including a right of carriageway, over the portion of the bridleway and footpath situate in 726 as appurtenant to their other land; and on a resale by the purchaser in 1836 a similar reservation of a way for all purposes was made by the vendor. No doubt it is possible for a highway and a private right of way to co-exist over the same spot, but it is unusual, and the reservation of the private way raises a very strong presumption that the way was not a public way at that date. There was some evidence before the justices of the lane having been used as a public way since 1840. But that fact was disputed, and even if it had been conceded it would not have established that the lane was a highway in 1835 in view of the reservation of a private way over the locus in quo in the conveyance of 1836. So things remained down to 1864, about which date the lane admittedly became a highway. I agree with the contention of the appellant that that change in its character is not shewn to have been due to the fact of Alderman Sidney laying out the two new roads that he did. For the only effect of those roads was to add two further connections between the northern portion of the lane and other high roads to the connection which already existed with Rydens Road. And in paragraph 5 there is an admission by the respondents that the said lane now was and had been since the year 1864 a highway used both by foot passengers and vehicles, but save as hereinafter may appear there was no evidence to shew how,

when, or under what circumstances and at whose expense it became such. Under these circumstances, the history of the lane being what I have stated, are we bound to hold that the district council, on whom I will take it that the onus lay in the first instance of shewing that it was not repairable by the inhabitants at large, have not discharged that onus? I think not. I do not agree with Mr. Danckwerts' contention with regard to s. 23 of the Act of 1835. He says it only applies where there is some person proposing to dedicate a highway, where, that is to say, there is an intentional dedication, and that it has no application to the case of a way becoming a highway by public user. It seems to me a very strong proposition that if you find that at some date after 1835 a road has become a public highway it must be repaired by the inhabitants at large unless you can see that there was some person who ought to have taken the steps prescribed by the section and did not. I am not prepared to accept that proposition. In my opinion, if on the facts there is no evidence of any person having gone through the formalities of s. 23 it is not to be presumed that the road, if it became a highway after 1836, is repairable by the inhabitants at large. That is the effect of the summing up of Wills J. in *Eyre* v. *New Forest Highway Board*. (1) The case of *Reg.* v. *Thomas* (2) has no application. The decision there turned upon the fact that the road had been a turnpike road, which is not the case here. Nor can I find anything in the judgment of Parker J. in *Attorney-General* v. *Watford* (3) to justify me in accepting Mr. Danckwerts' proposition that you are either to assume that the conditions of s. 23 do not apply or that they have been fulfilled. For these reasons I think that the justices on the evidence before them could properly come to the conclusion that this lane was not a highway in 1835, and that although it is a highway at the present time it is not repairable by the inhabitants at large.

PICKFORD J. I am of the same opinion. I think there was plenty of evidence on which the justices could find that this was

(1) 56 J. P. 517. (2) 7 E. & B. 399.
(3) [1912] 1 Ch. 417.

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Pickford J.

not a highway before 1835. If it was a highway before 1800 it ceased to be such then because all public ways not set out in the award were extinguished. By the award two allotments, Nos. 726 and 751, were given to Edward Peppin subject to a bridleway and footpath along the lane which was in question in this case for the use of the occupiers of a certain farm. Therefore it became set out by the award as a horsepath within the language of s. 23 of the Highway Act, 1835. The magistrates had before them some evidence of public user of the way in and after 1840 from which they might possibly have inferred that there had been a dedication between 1800 and 1835, but they rejected that evidence, and in my opinion they were entitled to do so. In 1864 or at some period not ascertained between 1835 and 1864 the lane became a highway. Do those facts bring the case within s. 23 or not? Mr. Danckwerts says that that section cannot apply unless you can point to some person "proposing to dedicate" who neglected to give the notices and perform the other conditions required by the section. I do not think that any of the authorities cited before us require us to come to that conclusion. I think that those words only apply to the roads and occupation ways mentioned in the earlier part of the section as being "made by and at the expense of an individual or private person, body politic or corporate," and that a way such as this which was "set out as a private driftway or horsepath in an award of commissioners under an Inclosure Act" is within the section whether its subsequent dedication as a highway was intentional on the part of the owner of the soil or not. Then if so the only question is whether the conditions of the section were performed. There is no evidence that they were. It is said that it ought to be presumed. But it seems to me that there is a finding in the case which effectually excludes any such presumption, and that is that for the whole of the time over which the history of the lane extends the public authority had never repaired it, but it had always been repaired by the adjoining landowners. I agree that judgment should be for the respondents.

AVORY J. I am of the same opinion. The appellant objected that the street proposed to be made up under the Private Street

Works Act was a highway repairable by the inhabitants at large. Upon whomever the burden lay in the first instance of proving or disproving that proposition, as to which I am not sure, it is clear that the respondents shifted the burden of proof upon the appellant as soon as they established the facts found in paragraphs 13 and 14 of the case. The question is whether, the burden being so shifted, the justices ought to have found that the appellant, notwithstanding the evidence as to the repairs of the road, had proved that it was in fact a highway repairable by the inhabitants at large. My view of s. 23 is that its practical effect is to get rid of the presumption that a highway is repairable by the inhabitants at large in the case of a highway which has been made or set out after 1835. Although we have power under the Judicature Act, 1894, to draw inferences of fact different from those drawn by the justices, I do not think that upon the evidence we could disagree with the finding of the justices that the road was not a public highway in 1835. That being so, the only question is whether the justices ought to have been satisfied by the evidence that the highway, although dedicated since 1835, was in fact repairable by the inhabitants at large, and as to that I think there is no ground on which we can say that they were wrong in arriving at the opposite conclusion.

Appeal dismissed.

Solicitors for appellant: *J. Westcott & Sons.*
Solicitor for district council: *Percy Webb.*

J. F. C.

C. A.
1912
May 2.

[IN THE COURT OF APPEAL.]

THE KING *v.* TEMPLER.
Ex parte HOWARTH.

Employer and Workman—Compensation—Committee representative of Employer and Workmen—Award—Application to review—Notice of Objection to Committee—Jurisdiction of County Court—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *Sched. I., par.* 12; *Sched. II., par.* 1.

Where a committee, representative of an employer and his workmen, acting under paragraph 1 of the Second Schedule to the Workmen's Compensation Act, 1897, have decided the amount to be paid weekly to a workman as compensation for an accident, and the workman subsequently desires that the weekly payment may be reviewed, and gives due notice that he objects to the committee holding an arbitration with respect to the review, a county court judge has jurisdiction to hear and determine the application to review.

So *held*, affirming the decision of a Divisional Court (Lord Alverstone C.J., Hamilton J., and Bankes J.). (1)

Appeal from the judgment of a Divisional Court making absolute a rule nisi calling upon the deputy judge of the county court of Yorkshire holden at Stokesley and Guisborough and Sir B. Samuelson & Co., Limited, to shew cause why the deputy judge should not proceed to hear and determine an application by William Howarth under the Workmen's Compensation Act, 1897, for an arbitration between the said William Howarth, applicant, and the said Sir B. Samuelson & Co., Limited, respondents, with respect to the review and increase of the weekly payment payable to William Howarth under the Act in respect of personal injury caused to him by an accident arising out of and in the course of his employment.

The facts were as follows: On March 22, 1907, the applicant, Howarth, being then a workman in the employment of the respondents, met with an accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act, 1897 (2), whereby his right hand and part of

(1) [1912] 1 K. B. 351.

(2) The Workmen's Compensation Act, 1906, did not come into force until July 1, 1907. The provisions of the Act of 1897 upon which the question in the present case turned are re-enacted in similar terms in the Act of 1906.

his right arm were torn off. His average weekly earnings at that date were 24*s.* The respondents agreed to pay and the applicant agreed to accept by way of compensation, under the Act, for the accident a weekly payment of 12*s.*, and on April 26, 1907, a memorandum of an agreement to this effect was filed in the county court. The respondents subsequently reduced the weekly payments to 8*s.* 6*d.* There was in existence a committee representative of the respondents and their workmen with power to settle matters under the Act of 1897 within the meaning of paragraph 1 of Sched. II. of the Act. The applicant objected to the reduction of the weekly payments made by the respondents, and he thereupon applied to the committee to deal with the question of the amount of compensation to which he was entitled. The committee met on December 29, 1909, to consider this question; the parties or their representatives appeared before the committee, and two alternative offers were then made on behalf of the respondents, namely, either that the weekly payment at the rate of 8*s.* 6*d.* should continue, or that the applicant should undertake certain light work in the respondents' employment, which they were prepared to offer him, at a weekly wage of 24*s.* The meeting of the committee was adjourned for these proposals to be considered by the applicant. On February 11, 1910, the committee held another meeting, and, being of opinion that the applicant was capable of doing the work offered by the respondents, they decided that the applicant should accept the respondents' offer of employment at 24*s.* a week, and the committee further decided that the compensation payable to the applicant should be terminated as from December 31, 1909. Notice of objection to the recording of a memorandum of the decision of the committee was in the first instance given by the applicant to the respondents, but ultimately a memorandum of the terms of the decision of the committee was by agreement, on July 6, 1910, recorded in the county court. On September 2, 1910, the committee met, and, with the consent of both parties, for the purpose of keeping alive the right to compensation, awarded that the sum of 1*d.* per week should be paid to the applicant as compensation under the Act. A memorandum of this award was recorded in the county court on September 26, 1910.

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The applicant continued to work for the respondents down to November 29, 1910, when he left their employment and ceased to work on the ground that he was as a result of the accident physically incapable of working. On February 7, 1911, the applicant gave notice of an application to the county court judge to review the weekly payment of 1*d.* payable under the award of the committee of September 2, 1910. On February 16 the respondents gave notice to the applicant that a meeting of the committee would be held on February 24, at which his application to review the weekly payment would be dealt with. On February 20 the applicant gave notice in writing to the respondents that he objected to the matter of his application to review being settled by the arbitration of the committee.

The application to review came on for hearing before the deputy county court judge. Objection was taken on behalf of the respondents that the deputy county court judge had no jurisdiction to hear the application, as the committee was the only tribunal which had power to review weekly payments payable under an award of the committee. The deputy county court judge held that he had no jurisdiction to entertain the application. The applicant thereupon obtained the rule nisi.

It was contended for the respondents in the Divisional Court (see [1912] 1 K. B. 351, at p. 353) in shewing cause against the rule that, upon the true construction of paragraph 1 of Sched. II. of the Workmen's Compensation Act, 1897, which provides that, "for settling any matter which under this Act is to be settled by arbitration," if there is a committee in existence, "the matter shall, unless either party objects, be settled by the arbitration of such committee," the word "matter" in that paragraph includes not only questions relating to the original claim for compensation, but also any questions which may subsequently arise between the parties as to such compensation, e.g., a question as to review of the weekly payment, and therefore, if a committee had once held an arbitration and made an award, it was not open to either party to object to the committee dealing with any further questions arising out of that award. It was contended for the applicant that the application to review an award was itself an independent "matter" within paragraph 1 of the Second Schedule to the Act.

The Court upheld the contention for the applicant, and therefore made the rule absolute.

The respondents appealed.

J. R. Atkin, K.C., and *Meynell*, for the respondents.

F. B. Merriman, for the applicant.

The arguments were, in substance, the same as in the Court below.

VAUGHAN WILLIAMS L.J. In the view which I take of this case I think it will be more convenient that Fletcher Moulton L.J. should deliver judgment first, giving the reasons why he thinks that the construction put by the Divisional Court upon the words of the Act is right.

FLETCHER MOULTON L.J. The decision of the learned judges in the Court below is in my opinion correct. My view of the legislation with which we are dealing is this. It being the intention that workmen who are injured by accidents arising out of and in the course of their employment should receive compensation, there was, no doubt, a hope, and a well-founded hope, that agreements would in many cases be come to between employers and workmen with regard to the compensation to be paid. But of course it could not be calculated that the parties would always come to such an agreement, and the question, therefore, arose how differences arising under the Act were to be settled. In the Act of 1897, as in the Act now in force, the Legislature appears to have been determined that such differences should not be settled by actions in the Courts of law, and, in more than one place in the Act and the schedules thereto, the Legislature, recognizing that there would be questions which would have to be decided in default of agreement, provided that they should be settled by arbitration in accordance with the Second Schedule of the Act. I therefore look to that schedule as containing the provisions which create and regulate the tribunal which is to take the place of a Court of law in regard to matters which have, in default of agreement, to be settled under the Act. That schedule begins with these words: "The following provisions shall apply for settling any matter which under

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Fletcher Moulton L.J.

this Act is to be settled by arbitration." I find that these matters are numerous. Sect. 1, sub-s. 3, of the Act provides that, "if any question arises in any proceedings under this Act as to the liability to pay compensation under this Act (including any question as to whether the employment is one to which this Act applies) or as to the amount or duration of compensation under this Act, the question, if not settled by agreement, shall, subject to the provisions of the First Schedule to this Act, be settled by arbitration, in accordance with the Second Schedule to this Act." Then I find, on turning to the First Schedule, paragraph (12.), that not only are the amount and duration of the compensation to be so settled, but that a weekly payment awarded by way of compensation may be reviewed at the request either of the employer or of the workman, and on such review "the amount of payment shall, in default of agreement, be settled by arbitration under this Act." And again by paragraph (13.), where there is an application by the employer for commutation of a weekly payment by payment of a lump sum, the amount of such sum is to be settled, in default of agreement, by arbitration under the Act. So I find that there are various matters which by the Act are to be settled by arbitration. The Second Schedule provides that all matters, which under the Act are to be settled by arbitration, shall be settled in accordance with the following provisions. Paragraph (1.) of the schedule gives generally a preference to a settlement of the matter in difference by a committee, representative of the employer and his workmen, where such a committee exists. The words are: "If any committee, representative of an employer and his workmen, exists with power to settle matters under this Act in the case of the employer and workmen, the matter shall, unless either party objects, by notice in writing sent to the other party before the committee meet to consider the matter, be settled by the arbitration of such committee, or be referred by them in their discretion to arbitration as hereinafter provided." Therefore, where there is a matter to be settled by arbitration under the Act, then, if a committee exists, the matter is to go before them, unless either party objects before the committee meets. But by paragraph (2.) "if either party so objects, or there is no such committee, or the committee so

refers the matter, or fails to settle the matter within three months from the date of the claim, the matter shall be settled by a single arbitrator agreed on by the parties, or in the absence of agreement by the county court judge, according to the procedure prescribed by rules of Court, or if in England the Lord Chancellor so authorizes, according to the like procedure, by a single arbitrator appointed by such county court judge." This applies generally, so that each separate "matter in difference" is to be so decided by virtue of the provision of the Act with regard to it. In my opinion, therefore, upon the true construction of these provisions the Court below was right in holding that the review of the weekly payment awarded by way of compensation was an individual and independent "matter" within the meaning of the Act, and must be decided by the committee, if no objection is taken, and by the county court judge, if, as here, one of the parties objects to the committee hearing it.

VAUGHAN WILLIAMS L.J. I do not propose to go through the provisions of the Act upon which this case turns at length. As I have already stated during the argument, I think that the words of those provisions are so ambiguous, or, perhaps it would be more correct to say, equivocal, that they are equally susceptible of two inconsistent constructions of the word "matter." That being so, I think that the question which of what I may call the rival constructions should be adopted must really turn upon convenience. One must look at the comparative convenience of the one and of the other construction, and then consider the words in the Act and in the First and Second Schedules, and decide, having regard to convenience, which of the two meanings was intended by the Legislature. If I had had to decide this case on my own judgment alone, I think that I should have arrived at the conclusion that the word "matter" in this Act ought to be so construed that, when once a committee or an arbitrator had dealt with a particular accident or a particular claim for compensation, then, if a review of the weekly payment were claimed, which review is not in any sense an appeal, but is an opportunity of adjusting the question between the parties in

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Vaughan Williams L.J.

regard either to new facts, or to facts which did not exist or were not known at the time of the decision by the tribunal, whether it was a committee or an arbitrator, which originally dealt with the claim for compensation, such an application for review, which I repeat is not an appeal, should go before the same tribunal as gave the first decision. I confess that I should have thought that conclusion more convenient than that at which the Court below arrived. In the course of the argument I alluded, by way of illustration, to cases, such as that of a ward of Court, where in the Chancery Division it is recognized that it is better that the same judge should deal with the whole matter, and decide the various questions in relation to it as they arise from time to time one after another. I find, however, that the Lord Chief Justice, Hamilton J., and Bankes J. have taken a different view from that which I have been expressing; and, finding that Fletcher Moulton L.J. agrees with them, with that weight of authority pressing against my view as to the construction to be adopted, I think that it is not convenient that I should differ from them. I acquiesce in their judgment because I think it is more convenient that I should do so, when four such distinguished judges arrive at a different conclusion from that which I have expressed, especially when I consider that, admittedly, the question must turn more upon considerations of convenience than on the words of the statute.

FARWELL L.J. It is not often that I find myself, after weighing the arguments in favour of one construction of a statute against those in favour of the other, in the position of being unable to see why the words should have the one meaning rather than the other. Either of the two constructions suggested in the present case appears to me perfectly good and reasonable. I confess that I am wholly unable to see that it matters in the least to any applicant under this Act, whether he be employer or workman, which conclusion we come to, or that there is any more convenience in one construction than in the other. That being so, I do not feel justified in differing from the unanimous decision of the Divisional Court. I cannot say that they were wrong, and, before reversing their decision, I ought to

be satisfied that they were so. I therefore acquiesce in their decision.

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Appeal dismissed.

Solicitors for applicant: *Indermaur & Brown, for C. W. Callis, Blackpool.*

Solicitors for respondents: *Van Sandau & Co., for T. M. Barron & Smith, Darlington, and for Belk, Cochrane & Belk, Middlesbrough.*

E. L.

In re MILLER.
Ex parte FURNITURE AND FINE ARTS DEPOSITORIES, LIMITED.

1912 *April* 22.

Bankruptcy—Practice—Bankruptcy Notice—Judgment in County Court—Payment into Court—Bankruptcy Notice for full Amount—Execution—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*)—*County Court Rules*, 1903 *and* 1904, *Order XXIII., r.* 13; *Order XXV., rr.* 8, 23A; *Appendix H, Form* 163.

Certain creditors recovered a judgment against a debtor in the county court. Before the day named in the judgment for payment of the debt the debtor paid into Court a sum in part satisfaction thereof. The judgment creditors repudiated this payment and issued a bankruptcy notice requiring the debtor to pay the judgment debt in full without making any allowance for the payment into Court:—

Held, that after the payment into Court execution could not issue for the full amount of the judgment, but only for the balance after giving credit for the amount paid into Court, and consequently that the bankruptcy notice was invalid.

In re Child [1892] 2 Q. B. 77, followed.

APPEAL from an order of the registrar of the county court of Middlesex holden at Brentford setting aside a bankruptcy notice issued by the Furniture and Fine Arts Depositories, Limited, judgment creditors, against a debtor.

On October 12, 1911, the Furniture and Fine Arts Depositories, Limited, recovered a judgment against the debtor for 57*l.* 5*s.* 6*d.* in the Clerkenwell County Court, and it was ordered that the sum should be paid on November 7. On November 6 the debtor paid

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into the Clerkenwell County Court the sum of 10*l.* On receiving notice of this payment the judgment creditors protested that it was invalid and that the registrar of the Clerkenwell County Court had no power to receive it. They subsequently issued in the Brentford County Court upon a certificate of judgment from the Clerkenwell County Court a bankruptcy notice for the full amount of the judgment, namely, 57*l.* 5*s.* 6*d.*

The debtor applied to set aside the notice on the ground that it was irregular as having been issued for an amount larger than the sum for which execution could have issued.

The registrar set aside the bankruptcy notice.

The judgment creditors appealed.

Coumbe, for the appellants. Where judgment is recovered in the county court for a sum exceeding twenty pounds exclusive of costs, s. 105 of the County Courts Act, 1888, provides that the full amount for which judgment has been obtained shall be ordered to be paid either forthwith or within fourteen days unless the plaintiff consents to payment by instalments. In that case the Court orders the sum to be paid at such times and by such instalments as shall be consented to. The rule proceeds "and all such moneys, whether payable in one sum or by instalments, shall be paid into Court." It is therefore the duty of the registrar of the Court to accept payment of the debt in full and nothing short of that, unless the plaintiff has consented to accept payment by instalments, which the appellants have never done. The payment of the 10*l.* in this case was not a payment which they were bound to accept: *Brook* v. *Emerson* (1); *In re Gentry.* (2) Order xxv., r. 8, of the County Court Rules, 1903 and 1904, which provides that execution shall be for the whole amount of the judgment remaining unsatisfied, does not help the respondent, because the judgment may be for payment by instalments, and the first instalments may be paid up to date; the rest of the judgment debt would then remain unsatisfied. Order xxiii., r. 13, carries the matter no further. The registrar of the county court has in excess of his authority and in breach of his duty accepted a payment on account. That acceptance does not bind the

(1) (1906) 95 L. T. 821. (2) [1910] 1 K. B. 825.

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appellants. The full amount of the judgment therefore remains due and unpaid, and the bankruptcy notice was properly issued for the full amount.

Herbert Jacobs, for the respondent. If it were necessary to establish that the registrar of a county court has power to accept payments in part satisfaction of a judgment debt, that power is conferred by Order XXIII., r. 13, and Order XXV., r. 8.

By Order XXIII., r. 13, the registrar shall give notice by post, according to the form in the Appendix, to the party in whose favour it is made, of every payment made into Court, whether by instalments or otherwise, in pursuance of a judgment or order, where the payment exceeds ten shillings. The rule speaks of every payment made into Court. The form in the Appendix, i.e., Form No. 156 in Appendix H to the Rules, is in these words: "I hereby give you notice, that A.B., the defendant [or garnishee] has paid into Court the sum of £—— under the judgment [or order] obtained by you against him herein." By Order XXV., r. 8, "Where a defendant has made default in payment of the whole amount awarded by the judgment or order, or where the judgment or order was for payment by instalments of an instalment thereof, a warrant of execution may issue against his goods without leave; and such execution shall be for the whole amount of the judgment or order and costs then remaining unsatisfied, or in the case of an order for payment by instalments, for such portion thereof as the Court shall order, either at the time of making the original order or at any subsequent time." This rule mentions an order for payment of the whole amount in one sum and also an order for payment by instalments. In the former case it speaks of execution going for the whole amount then remaining unsatisfied, implying that less than the full amount may have been paid. Further, by Order II., r. 34, "Every high bailiff levying or receiving any money by virtue of the process of any county court shall, except where he is by statute required to retain the same, within twenty-four hours of the receipt thereof, pay over the same to the registrar of the Court of which he is high bailiff, who shall indorse upon the warrant a memorandum of having received the same . . . ."

But it is sufficient for the respondent to shew that execution

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could not have issued for the whole sum named in the bankruptcy notice. If that be so the bankruptcy notice is invalid. That is the effect of s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, as interpreted by the Court in *In re Child* (1); *In re Follows.* (2) In the present case execution could only have issued for 47*l.* 5*s.* 6*d.* The process of execution differs in the county court from that in the High Court. In the High Court the sheriff levies the amount of the judgment and pays it to the plaintiff. In the county court the Court itself executes the judgment. The judgment directs that the defendant do pay the amount recovered "to the registrar of the Court": see *In re a Debtor*, 484 *of* 1908. (3) It is common practice for debtors to pay sums into Court on account of judgments recovered against them. If the Court has thus collected or received part of the judgment debt, it can only issue execution for the balance. The procedure is prescribed by s. 146 of the County Courts Act, 1888. The registrar at the request of the party prosecuting the judgment issues under the seal of the Court a warrant of execution in the nature of a writ of fieri facias to the high bailiff of the Court, who is empowered by the warrant to levy the sum of money ordered to be paid. By s. 155 upon every warrant of execution the registrar of the Court is to cause to be inserted or indorsed the sum of money and costs adjudged. By Order xxv., r. 7, the registrar before issuing any warrant may require the plaintiff to furnish a præcipe as therein described. By r. 8 execution is to issue for the whole amount of the judgment or order and costs remaining unsatisfied. By r. 17 the registrar on issuing the warrant must insert in or indorse on the warrant the amount to be levied, distinguishing the amount adjudged to be paid, and remaining due. The form of the warrant, Form 163 in Appendix H to the Rules, indicates that the following items are to be specified: the amount for which the judgment or order was obtained, the amount paid into Court, the amount remaining due, poundage, and the total amount to be levied. Rule 23A provides that: "(1.) Where after the issue of a warrant of execution, but before sale, money is paid into the

(1) [1892] 2 Q. B. 77. (2) [1895] 2 Q. B. 521.
(3) [1908] 2 K. B. 692.

Court out of which the warrant is issued, or into any foreign Court to which the warrant has been sent for re-issue under s. 158 of the Act, or to the bailiff holding the warrant, the following provisions shall apply. (2.) Where payment is made into the Court in the district of which the warrant is to be executed, the fact and amount of such payment shall forthwith be notified by the registrar through the high bailiff to the bailiff holding the warrant . . . . (4.) The bailiff holding the warrant, on receiving any payment or a notice of any payment, shall forthwith indorse on the warrant the amount of such payment, and shall sign the indorsement; and if the amount paid is not sufficient to satisfy the amount to be levied and the costs of execution incurred before payment or notice of payment is received, the execution, unless withdrawn by the plaintiff, shall proceed only for the balance of the original amount to be levied and the costs of execution calculated on that amount, less the amount so paid." These rules encourage and invite payment into Court, and provide that execution is only to issue for the balance remaining due after giving credit for the payments. In this case, therefore, execution could only issue for 47*l.* 5*s.* 6*d.* The bankruptcy notice demanding payment of 57*l.* 5*s.* 6*d.* was a bad notice.

Coumbe in reply.

PHILLIMORE J. This is an appeal from the order of a county court setting aside a bankruptcy notice which had been issued against the debtor. Several points were raised which it is not necessary to decide. The judgment creditors had got a judgment for a sum of 57*l.* 5*s.* 6*d.* which by the terms of the judgment was to be paid into Court on November 7. On November 6 the debtor paid into Court a sum of 10*l.* The judgment creditors on hearing of this payment protested that it ought never to have been accepted and that they would not be bound by it, and holding this view they issued a bankruptcy notice calling upon the debtor to pay the full sum of 57*l.* 5*s.* 6*d.* The registrar has held that the bankruptcy notice is bad, and we think it is. Many questions may arise as to the right to make payment into Court in part satisfaction of a judgment debt and the effect of such a

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payment. The procedure for obtaining satisfaction of a judgment debt in the county court differs from that in the High Court. In the county court the judgment debt must be paid to the registrar, and it is dealt with by the officials according to the rules of the Court. In the High Court the sheriff realizes the sum of the judgment debt and pays it to the judgment creditor or his solicitor. No debtor in the High Court could require his creditor to accept part payment either before or after execution. It may be that a different rule prevails in the county court. Order XXIII., r. 13, seems to indicate that a debtor may, for what it is worth, make payment into Court of sums less than the full amount due from him. As a matter of fact this is often done, and the plaintiff accepts the money in part satisfaction. Whether he is bound so to accept it or not, and whether if he declines to accept it the payment operates as part satisfaction, we do not decide. That is not the question before us. When the question comes to be decided there will be much to say on both sides. The question here is as to the validity of a bankruptcy notice, which must be for a sum for which execution can issue. The words of s. 4 of the Bankruptcy Act, 1883, are "If a creditor has obtained a final judgment against him"—i.e., the debtor—"for any amount, and execution thereon not having been stayed, has served on him . . . . a bankruptcy notice under this Act," &c. Those words intimate that a creditor can only issue a bankruptcy notice for a sum for which he has a present right to issue execution and for the amount for which execution can issue. The question therefore is, Could the respondents have got the county court to issue execution for 57*l.* 5*s.* 6*d.*? Having regard to the circumstances and to the various sections and rules which have been cited, I think it clear that the county court officers could not and would not have issued execution for more than 47*l.* 5*s.* 6*d.* By Order XXV., r. 7, the registrar before issuing a warrant of execution may require the person applying for the warrant to produce the plaint note or summons issued in the action and to furnish a præcipe containing the number of the plaint, and the residence, or place of business, and description of the person against whose goods the warrant is to be issued. By r. 8, where a defendant has made default in payment of the whole amount awarded by the

judgment or order, or where the judgment or order was for payment by instalments of an instalment thereof, a warrant of execution may issue against his goods without leave; "and such execution shall be for the whole amount of the judgment or order and costs then remaining unsatisfied," &c. The form of a warrant of execution is given in Appendix H to the Rules of 1903 and 1904. It is numbered 163. It contains entries of the amount for which the judgment or order was obtained, the amount paid into Court, and the amount remaining due; then the poundage for issuing the warrant, and then the total amount to be levied with fees for execution of the warrant. Thus it is not for the execution creditor to say for how much he is going to issue execution. It is for the clerk in the county court office after consulting his ledgers to see how much remains due and to calculate the sum for which execution is to issue. In the present case, the sum of 10*l.* having been paid into Court, execution could only have issued for 47*l.* 5*s.* 6*d.* A bankruptcy notice could only issue for the same amount, and this bankruptcy notice having issued for 57*l.* 5*s.* 6*d.* was bad. The appeal must therefore be dismissed.

BRAY J. I am of the same opinion. The amount for which a bankruptcy notice can issue is the amount for which execution can issue and no more. This is clear from the judgment of Vaughan Williams J. in *In re Child.*(1) "I wish," said the learned judge, "to state my view of this part of the sub-section" —i.e., sub-s. 1 (*g*) of s. 4 of the Bankruptcy Act, 1883. "I think that under it a creditor who has obtained final judgment is not entitled to serve a bankruptcy notice in respect of any amount greater than that for which he could have issued execution, and that, therefore, if the circumstances of the case are such that he has ceased to be entitled to issue execution for the whole amount of the judgment debt, he has ceased to be entitled to serve a bankruptcy notice for the whole amount of the judgment debt." In this case the bankruptcy notice issued for a sum of 57*l.* 5*s.* 6*d.* We have to say whether at the date of the issue execution could have gone for 57*l.* 5*s.* 6*d.* or only for 47*l.* 5*s.* 6*d.*

(1) [1892] 2 Q. B. 77.

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MILLER, *In re.* FURNITURE AND FINE ARTS DEPOSITORIES, LIMITED, *Ex parte.*

Bray J.

The County Court Rules as to payment into Court are not quite as clear as one could have wished, but it seems to me that a judgment debtor may pay less than the full amount for which the judgment or order was obtained. What the effect of such a payment may be it is not necessary for us to decide. Sect. 105 of the Act to my mind leaves it doubtful. But Order XXIII., r. 13, seems to make it fairly clear that part payment, whatever its effect, may be made. That rule provides that the registrar shall give notice by post, according to the form in the Appendix to the Rules, to the party in whose favour it is made, of every payment made into Court, whether by instalments or otherwise, in pursuance of a judgment or order, where the payment exceeds ten shillings. That implies that a judgment debtor may pay into Court an amount less than the amount ordered. The next thing is to see for what amount execution may issue. By Order XXV., r. 8, where a defendant has made default in payment of the whole amount awarded by the judgment or order . . . . a warrant of execution may issue and the execution shall be for the whole amount of the judgment or order then remaining unsatisfied. The form of a warrant of execution, No. 163 in Appendix H to the Rules of 1903 and 1904, specifies among the items to appear on the warrant the amount of the judgment, the amount paid into Court, and the amount remaining due. Order XXV., r. 23A, confirms this; it provides that where after the issue of a warrant of execution, but before sale, money is paid into the Court out of which the warrant is issued the fact and amount of the payment is to be notified by the registrar through the high bailiff to the bailiff holding the warrant. Then the bailiff holding the warrant, on receiving any payment or a notice of any payment, is to indorse on the warrant the amount of the payment. If the amount paid is not sufficient to satisfy the amount to be levied and the costs of the execution, the execution proceeds for the balance of the original amount to be levied and the costs of execution calculated on that amount, less the amount so paid. That implies that at any time an amount may be paid into Court less than the amount of the judgment. The rule does not say expressly that payment may be made piecemeal; it says what shall be done when payment is so made, namely, that execution is to issue for the balance

only after giving credit for the instalments. The true position was explained by Mr. Jacobs : The practice in the county court differs from that in the High Court; in the former case the Court itself, in the latter an officer of the Court, the sheriff, executes the judgment. Here there was in Court a sum of 10*l.* on account of the judgment and I think it is clear that execution could not issue in respect of that sum. For these reasons I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellants : *Clarke, Lewthwaite & Co.*
Solicitor for respondent : *Percy R. Gibbs.*

W. H. G.

PLANT *v.* COLLINS.
DEELEY, CLAIMANT.

County Court—Interpleader—Judgment for a Debt—Execution and Sale of Goods of Judgment Debtor—Claim by Assignee of the Debt to Proceeds of Sale—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *ss.* 156, 157.

Where a creditor, who has assigned a debt together with all securities for the same, subsequently recovers judgment against his debtor in the county court and the goods of the judgment debtor are taken in execution and sold, the assignee of the debt cannot claim the proceeds of sale under ss. 156 and 157 of the County Courts Act, 1888.

APPEAL from the Wolverhampton County Court.

In 1908 the plaintiff, Plant, by deed assigned to the claimant, Deeley, all book and other debts and sums of money then and thereafter to become owing to him, whether for costs, money lent, or money paid by him, in connection with his business and profession of a solicitor, together with all securities for the same; and Plant appointed Deeley to be his attorney for him and in his name or otherwise to demand, receive, sue for and recover the said costs, debts, and sums of money thereby assigned.

In 1911 Plant sued Collins in the county court for the sum of 10*l.* due for costs, and Collins set up a counter-claim for damages for negligence. In the result, on December 15, Plant recovered

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judgment for debt and costs, amounting in all to 37*l.* Execution was issued and goods of Collins were seized and sold, the net proceeds of the execution being 31*l.* On January 2, 1912, Deeley gave formal notice to the high bailiff that he claimed the proceeds of sale; the high bailiff gave Plant notice of this claim, and on January 16 issued a summons to Deeley, under s. 157 of the County Courts Act, 1888 (1), to appear and support his claim; and on January 23 Deeley duly gave particulars of his claim to the high bailiff and to Plant, stating that he claimed the sum of 31*l.* in the hands of the high bailiff, being the amount realized under the execution against Collins, upon the ground that he was entitled thereto by virtue of the deed of assignment of 1908. On December 23 Deeley had given Collins written notice of the assignment of 1908.

At the hearing of the interpleader summons the county court judge held that Deeley was not entitled to any part of the sum of 31*l.* because he had not shewn any title to the goods taken in execution, and gave judgment in favour of Plant. Deeley appealed.

H. A. McCardie, for the appellant. The judgment obtained by Plant was a security for the debt due from Collins: *Slater* v.

(1) 51 & 52 Vict. c. 43, s. 156: "Where any claim shall be made to or in respect of any goods taken in execution under the process of the Court, the claimant may deposit with the bailiff either the amount of the value of the goods claimed, such value to be affixed by appraisement in case of dispute, to be by such bailiff paid into Court, to abide the decision of the judge upon such claim, or the sum which the bailiff shall be allowed to charge as costs for keeping possession of such goods until such decision can be obtained, or may give to the bailiff in the prescribed manner security for the value of the goods claimed, and in default of the claimant so doing, the bailiff shall sell such goods as if no such claim had been made, and shall pay into Court the proceeds of such sale to abide the decision of the judge."

Sect. 157: "If any claim shall be made to or in respect of any goods or chattels taken in execution, or in respect of the proceeds or value thereof, by any person, it shall be lawful for the registrar upon application of the high bailiff, as well before as after any action brought against him, to issue a summons calling before the Court as well the party issuing such process as the party making such claim, and the judge shall adjudicate upon such claim, and make such order between the parties in respect thereof and of the costs of the proceedings, as he shall think fit, ..."

Pinder (1); *In re Ford* (2); *West Ham Union* v. *Ovens* (3); *Usher* v. *Martin* (4); and the assignment to Deeley was of debts "together with all securities for the same." Therefore, by virtue of the assignment, Deeley was entitled to the proceeds of the execution issued upon the judgment. The whole of this judgment debt clearly came within the words of the assignment. Plant was a trustee of the debt for Deeley, and obtained judgment and levied execution as such trustee; and therefore Plant was trustee for Deeley of the proceeds of the execution and Deeley had a good claim to the money.

Barrington Ward, for the respondent. The application of the claimant was wholly misconceived. These proceedings were taken under ss. 156 and 157 of the County Courts Act, 1888. Those two sections must be read together, and when so read it is clear that "the proceeds" mentioned in s. 157 are the proceeds of goods taken in execution and sold by the high bailiff under s. 156 after a claim has been made to the goods. A person can only claim the proceeds of sale, under s. 157, if he had a good claim to the goods themselves. In this case the claimant made no claim at all to the goods taken in execution.

[He was stopped by the Court.]

McCardie in reply. The claimant had a good title to the proceeds of sale, and the words of s. 157, "or in respect of the proceeds" of goods taken in execution, are not restricted to the proceeds of sale referred to in s. 156. The words of s. 157 are quite general and will include any claim to the proceeds of goods taken in execution. The claimant had a good equitable title to this money to which effect ought to be given by the county court: see s. 89 of the Judicature Act, 1873.

RIDLEY J. I have come to the conclusion that the decision of the county court judge was right. In 1908 the plaintiff, Plant, assigned all debts and sums of money owing or to become owing to him in his business as a solicitor, together with all securities for the same, to the claimant, Deeley, by way of mortgage. In

(1) (1871) L. R. 6 Ex. 228.
(2) [1900] 2 Q. B. 211.
(3) (1872) L. R. 8 Ex. 37.
(4) (1889) 24 Q. B. D. 272.

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Ridley J.

1911 Plant sued Collins to recover some costs, and Collins set up a counter-claim for negligence. In the result Plant recovered judgment for debt and costs amounting to 37*l.* Execution was issued and goods of Collins were seized and sold, the net proceeds of the execution in the hands of the high bailiff being 31*l.* Deeley then claimed that sum of 31*l.* from the high bailiff by virtue of the assignment from Plant, and the high bailiff took out an interpleader summons. The county court judge decided that the claimant was not entitled to the money because he had not shewn any title to the chattels taken in execution. I think that decision is correct.

Counsel for the claimant has argued that he was entitled to this money because he was assignee of the debt in respect of which the judgment was obtained and the judgment was a security for that debt. However that may be, it does not entitle him to claim this money, which is the proceeds of execution, under the interpleader procedure. In my opinion, the claimant, under ss. 156 and 157 of the County Courts Act, 1888, must make out a claim to the goods taken in execution. Under s. 156 a claimant of goods taken in execution may pay into Court, or give security for, the value of the goods, and in default of his so doing the high bailiff must sell and pay the proceeds of sale into Court; and then s. 157 provides that if a claim is made to goods taken in execution or to "the proceeds or value thereof" the high bailiff may issue an interpleader summons. I think that those words in s. 157 refer back to s. 156 and relate to the proceeds or value of goods which have been claimed. In this case, therefore, it was necessary for Deeley to establish a claim to the goods before he could claim the proceeds of sale; and he did not and could not make any claim to the goods which were admitted to be the goods of the judgment debtor. I think, therefore, that the county court judge was right and that this claim cannot be made in an interpleader proceeding.

Mr. McCardie argued that the claimant had a good equitable claim to this money, and he referred to s. 89 of the Judicature Act, 1873, as shewing that he was entitled to maintain that claim in these proceedings. We have to see, however, whether this claim is properly made under the provisions of the County

Courts Act, and I have come to the conclusion that it is not and that this appeal must be dismissed.

LUSH J. The sole object of ss. 156 and 157 of the County Courts Act, 1888, was to provide for cases where goods had been taken in execution under a judgment and some person other than the judgment debtor claimed to be entitled to the goods When one looks at s. 156 it shews clearly why the words upon which the appellant relies, "proceeds or value," were used in s. 157. Sect. 156 provides that where goods have been taken in execution a person who claims those goods may do one of three things, that is, he may pay the value of the goods into Court or give security for that value, or deposit a sum sufficient to cover the cost of keeping possession; in default of his so doing the high bailiff has to sell the goods and pay the proceeds into Court to abide the decision of the judge. Then comes s. 157, which provides for the case of a claim being made "to goods or chattels taken in execution or in respect of the proceeds or value thereof." It is clear, in my opinion, that those words relate back to s. 156 and that "proceeds or value" mean the proceeds or value of goods which have been claimed by some person other than the judgment debtor. Therefore s. 157 deals either with the goods themselves or with the proceeds of the goods when a claim has been made to the goods and they have been sold under s. 156.

In this case it is not suggested that the claimant ever had any claim to the goods; it is admitted that they belonged to the judgment debtor. That being so, in my opinion the present claim is not a claim within s. 157 of the Act, because to be a good claim under that section there must be a claim to the goods whether they still exist as goods or have been sold by the high bailiff pursuant to s. 156. When once it is admitted that the claimant never had any claim to the goods, it seems to me to follow that he never had any claim to the proceeds of the goods within the meaning of s. 157.

I wish to make it clear that I do not think that the interpleader proceedings were improperly taken, as has been suggested. It seems to me that they were properly taken, for all that the high bailiff knew was that he had in his hands the proceeds of the

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Lush J.

sale of goods taken in execution and that two persons were claiming the money. I think that the high bailiff was quite justified in taking these proceedings under s. 157; but when the claimant came forward to prove his claim it became clear that he never had any claim to the "proceeds of sale," within s. 157, because he had no claim to the goods. I think that the county court judge took the right view and that this appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Field, Roscoe & Co., for F. Deeley, Dudley.*

Solicitor for respondent: *C. F. Smith, for Plant, Dudley.*

J. H. W.

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May 6, 13, 24.

[COURT OF CRIMINAL APPEAL.]

REX *v.* HUDSON.

Criminal Law—Evidence—Prisoner called as Witness—Questions as to Previous Conviction—Imputations on Character of Witnesses for Prosecution—Criminal Evidence Act, 1898 (61 & 62 *Vict. c.* 36), *s.* 1.

In s. 1 of the Criminal Evidence Act, 1898, which provides that a person charged with an offence and called as a witness shall not be asked any questions tending to shew that he has committed or been charged with or convicted of any other offence, the words of sub-s. (*f*) (ii.), "unless the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution," must receive their ordinary and natural interpretation and must not be qualified by adding or inserting the words "unnecessarily," or "unjustifiably," or "for purposes other than that of developing the defence," or other similar words.

The appellant was charged with having stolen money and a bank book from the prosecutor in a public-house; the appellant and several other men were present at the time of the theft, and the bank book was found in the appellant's pocket. The defence set up was that one or more of the other men had committed the theft and had put the bank book into the appellant's pocket, and when two of these men were called as witnesses for the prosecution they were asked questions by the appellant's counsel with a view to shew that they had committed the theft. The appellant was called as a witness for the defence and,

without objection by his counsel, was asked questions by counsel for the prosecution as to a previous conviction:—

Held, that the nature and conduct of the defence were such as to involve imputations on the character of witnesses for the prosecution, within s. 1 (*f*) (ii.) of the Criminal Evidence Act, 1898, and that therefore the accused could be cross-examined as to previous convictions.

Rex v. *Bridgwater* [1905] 1 K. B. 131, *Rex* v. *Preston* [1909] 1 K. B. 568, and *Rex* v. *Westfall* (1912) 7 Cr. App. Rep. 176, considered.

APPEAL from a conviction for larceny.

The appellant, Hudson, was convicted at the Liverpool quarter sessions of stealing 65*l.* and a Post Office Savings Bank book from P. Quinn. P. Quinn, his brother James, and one O'Hanlon were in a public-house, and five other persons including Hudson were also in the same part of the house. P. Quinn, who had in his pocket a savings bank book and a canvas bag containing between 65*l.* and 70*l.*, fell upon the floor and was picked up by two or three men; while on the ground he felt a hand in his pocket and on recovery missed the bag of money and the bank book. Later that night the bank book was found in Hudson's pocket. Hudson's defence was that one or more of the other men had committed the theft and had put the bank book into his pocket.

James Quinn and O'Hanlon were called as witnesses for the prosecution. In cross-examining them counsel for Hudson asked James Quinn whether he and O'Hanlon did not get the 70*l.*, and charged O'Hanlon with robbing P. Quinn and running away after robbing him. Hudson was called as a witness for the defence, and counsel for the prosecution asked and obtained leave to cross-examine him as to his previous career, counsel for Hudson not objecting. Hudson was then cross-examined as to a previous conviction which he admitted.

Hudson appealed upon the ground (among others) that the cross-examination as to previous conviction was inadmissible under s. 1 of the Criminal Evidence Act, 1898. (1) The appeal

(1) Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), s. 1: "Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person.

"Provided as follows:—

"(*f*) A person charged and called as a witness in pursuance of this Act shall not be asked, and

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was heard on May 6 before three judges, who were of opinion that the appeal failed upon all the points except the above, but adjourned the appeal for that question to be argued before five judges.

May 13. *Madden*, for the appellant. The questions as to previous conviction were not permissible under s. 1 of the Criminal Evidence Act, 1898. The accused was entitled to raise the defence that the theft was committed by one or more of the other men who were present, and that was the defence which he set up. The questions asked of the two witnesses for the prosecution were properly asked for the purposes of that defence, and it cannot make any difference that the men whom the accused charged with having committed the theft happened to be witnesses for the prosecution. The fact that they were witnesses for the prosecution cannot debar him from developing that defence except under penalty of being cross-examined as to his character and previous convictions. In *Rex* v. *Bridgwater* (1) the Court held that raising a defence is not making imputations on the character of a witness for the prosecution within the meaning of s. 1 (*f*) (ii.) of the Act; that the imputations must be independent of and not simply for the development of the defence. The same principle was stated in *Rex* v. *Preston* (2), *Rex* v. *Westfall* (3), and *Rex* v. *Sheean*. (4) The case of *Reg.* v. *Marshall* (5), in which Darling J. held that a prisoner who in giving evidence alleged that a witness for the prosecution had

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if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—

"(ii.) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution."

(1) [1905] 1 K. B. 131.
(2) [1909] 1 K. B. 568.
(3) 7 Cr. App. Rep. 176.
(4) (1908) 24 Times L. R. 459.
(5) (1899) 63 J. P. 36.

committed the crime could be cross-examined as to previous convictions, must be taken to be overruled by the later cases.

A. E. Griffith, for the prosecution. The words of s. 1 (*f*) (ii.) of the Act are plain and clear, and provide that, if imputations are in fact made upon witnesses for the prosecution by the nature or conduct of the defence, the accused is not protected from cross-examination as to character and previous convictions. The questions asked of the witnesses for the prosecution were not in relation to facts set up by the defence, but were in relation to the nature of the defence. The cases relied on for the appellant are distinguishable for that reason. In *Rex* v. *Sheean* (1) the offence was rape, in which the charge is that what was done was "against the will" of the prosecutrix, and therefore questions asked as to consent related to the issue in the case.

Here no objection was taken to the questions asked of the accused, and therefore the objection cannot be taken now: *Rex* v. *Bridgwater*. (2)

Madden replied.

Cur. adv. vult.

May 24. The written judgment of the COURT (Lord Alverstone C.J., Bray, A. T. Lawrence, Pickford, and Avory JJ.) was delivered by

LORD ALVERSTONE C.J. In this case the appellant was convicted of stealing 65*l.* and a Post Office Savings Bank book from one Peter Quinn and was sentenced to six months' hard labour. He applied for leave to appeal against the conviction on the facts, and alleged misdirection; he also appealed on the ground that he was improperly cross-examined as to a previous conviction.

The appeal was originally heard on May 6 before Bray, Pickford, and Avory JJ. They were of opinion that there was no ground for interfering with the conviction upon the evidence or on the ground of misdirection. Upon the question of cross-examination the Court was of opinion that having regard to certain expressions in the judgments of the Court in the cases of *Rex* v. *Bridgwater* (2) and *Rex* v. *Preston* (3) it was desirable

(1) 24 Times L. R. 459. (2) [1905] 1 K. B. 131.
(3) [1909] 1 K. B. 568.

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that this point should be argued before a Court of five judges, and accordingly the case was re-argued before the Lord Chief Justice and Bray, A. T. Lawrence, Pickford, and Avory JJ. on May 13.

The facts which gave rise to the question are as follows. The prosecutor, Peter Quinn, and his brother James and a man named O'Hanlon, were in a public-house between 10.30 and 11 on the night of February 13. The prosecutor, Peter Quinn, had in his pocket a bank book and a canvas bag containing between 65*l.* and 70*l.* Five other persons including the prisoner were also in the same part of the public-house. After having some drinks Peter Quinn, the prosecutor, appears to have fainted, or fallen on the floor, and was picked up by two or three men. While on the ground he felt some one's hand in his pockets and on recovery missed the bag of money and the bank book. The bank book was found in the pocket of the prisoner about 12.30 the same night. James Quinn, the prosecutor's brother, was called to say what he had seen in the public-house, and, in cross-examination, Mr. Madden, the counsel defending Hudson, asked him whether he and O'Hanlon did not get the 70*l.*, and, when O'Hanlon was called, Mr. Madden charged him with robbing the prosecutor and running away after robbing him. Later the prisoner was called, and Mr. Marshall, the counsel for the prosecution, applied to be allowed to cross-examine him as to his career, and the deputy recorder gave him leave. No objection was taken by Mr. Madden. Before dealing with the point upon the merits we desire to express our concurrence in the observations of the Court in *Rex* v. *Bridgwater* (1) as to the absence of objection by the prisoner's counsel. The absence of objection is not conclusive, but it is a circumstance to be considered by the Court, and may, in some cases, have an important bearing upon the question whether an appellant should be entitled to raise on appeal the question whether he ought to have been cross-examined.

Dealing now with the question on its merits, the prisoner's counsel, in cross-examining the witnesses for the prosecution, suggested that each of those witnesses had in fact been concerned

(1) [1905] 1 K. B. 134.

in the robbery. The Court is clearly of opinion that such questions are within the words of paragraph (ii.) of clause (*f*) of s. 1 of the Criminal Evidence Act, 1898, "unless . . . . the nature or conduct of the defence is such as to involve imputations on the character . . . . of the witnesses for the prosecution." It was, however, contended that certain expressions in the judgments of the Court in the cases of *Rex* v. *Bridgwater* (1), *Rex* v. *Preston* (2), and *Rex* v. *Westfall* (3) put a different construction upon the section, and laid down a general rule under which the cross-examination was not permissible.

The first reported case in which the question appears to have arisen is the case of *Reg.* v. *Marshall* (4), in which Darling J., at the Central Criminal Court, after consulting the Recorder and Common Serjeant, ruled that in a case of murder, where the prisoner giving evidence alleged that the deceased had been killed by her husband, who had been called as a witness for the prosecution, she could be cross-examined as to previous convictions. This ruling has been followed on many occasions.

In *Rex* v. *Bridgwater* (5) a conviction was quashed on the ground that the appellant had been improperly cross-examined. In that case counsel for the prisoner had cross-examined a police sergeant, Moss, suggesting that the prisoner, who was convicted for stealing copper, had acted under the instructions of Moss in obtaining possession. These questions put to Moss did not involve any imputation on his character, as he admitted that he had previously employed the prisoner to obtain information for him, and in giving judgment in that case I pointed out that the learned judge in summing up the case had told the jury that if they thought the prisoner was in point of fact acting under the directions of Moss they should acquit him.

In *Rex* v. *Preston* (2) a conviction was also quashed on the ground that the prisoner had been improperly cross-examined. In that case counsel for the prisoner had questioned the police inspector as to the way in which a certain attempt to identify the prisoner had been carried out. The prisoner had not been

(1) [1905] 1 K. B. 134.
(2) [1909] 1 K. B. 568.
(3) 7 Cr. App. Rep. 176.
(4) 63 J. P. 36.
(5) [1905] 1 K. B. 131.

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identified on the occasion in question, but it was suggested that the method of identification was unfair.

My brother Channell in delivering the judgment of the Court said: "The statement in the present case was a mere unconsidered remark made by the prisoner without giving any serious attention to it, and in our opinion it does not come within s. 1, sub-s. (*f*) (ii.), of the Act as being an imputation made upon the character of a witness for the prosecution for the purpose of discrediting his testimony. If that were the nature of the imputation the prisoner could be cross-examined as to his character." And in the recent case of *Rex* v. *Westfall* (1), where a prisoner had made an attack on the magistrate and members of the police force and cross-examined the prosecutor as to his being a habitual drunkard, and made a charge of improper violence against the constable who arrested him, my brother Hamilton, delivering the judgment of the Court, consisting of Channell J., Lush J., and himself, cited the two passages from *Rex* v. *Preston* (2) and *Rex* v. *Bridgwater* (3), and held that cross-examination of the prisoner was not admissible, following those two cases.

The decisions in these three cases may well be supported on grounds which do not touch the question raised in the present case. They cannot be treated as laying down a general rule applicable to all cases, and in the opinion of the Court they are not a complete enunciation of the law under the section. The Court certainly had no intention, in giving judgment in *Rex* v. *Preston* (2), of overruling *Reg.* v. *Marshall* (4), which was cited before them in the course of the argument. In our opinion, where a prisoner, certainly when defended by counsel, has through that counsel accused the witnesses of having committed the crime with which he, the prisoner, is charged, the case comes directly within the section and the prisoner can be cross-examined as to his character or previous convictions.

We think that the words of the section, "unless the nature or conduct of the defence is such as to involve imputations," &c., must receive their ordinary and natural interpretation, and that

(1) 7 Cr. App. Rep. 176.
(2) [1909] 1 K. B. 568.
(3) [1905] 1 K. B. 131, 134.
(4) 63 J. P. 36.

it is not legitimate to qualify them by adding or inserting the words "unnecessarily," or "unjustifiably," or "for purposes other than that of developing the defence," or other similar words.

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Appeal dismissed.

Solicitors for appellant: *Helder, Roberts & Co., for John A. Behn, Liverpool.*

Solicitor for prosecution: *Director of Public Prosecutions.*

J. H. W.

WILLIAMS, APPELLANT *v.* FRIEND, RESPONDENT.

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April 30.

Adulteration—Cream—Sale to Prejudice of Purchaser—Preservative—Notice in Shop—Preservative injurious to Health—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 6.

The appellant, a dairyman, exhibited a notice in his shop, which could be read by any purchaser, that "all cream sold at this establishment contains a small proportion of boron preservative (not exceeding one half of 1 per cent.) to keep it sweet and wholesome, which has been the recognized method of preservation for over twenty years." A purchaser asked for and bought at the appellant's shop some cream, which upon analysis was found to contain an amount of boron preservative slightly less than that stated in the notice. The purchaser had read the notice before being supplied with the cream. Upon an information against the appellant under s. 6 of the Sale of Food and Drugs Act, 1875, for having sold to the prejudice of the purchaser cream which was not of the nature, substance, and quality of the article demanded by the purchaser, the justices convicted him, finding that the cream was injurious to health:—

Held, that, as the purchaser had notice that the cream was mixed with an ingredient, though he was not told the exact nature or effect of that ingredient, and as he chose to buy the cream so mixed, the sale was not to his prejudice within the meaning of s. 6, and the conviction was wrong.

CASE stated by justices for the Royal borough of Kensington.

An information was laid by the respondent, an inspector under the Sale of Food and Drugs Acts, against the appellant, for that he, on June 27, 1911, did unlawfully sell to the prejudice of the purchaser an article of food, to wit, cream, which was not of the

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nature, substance, and quality of the article demanded by the purchaser for the reason that the same contained 0·273 per cent. of boron trioxide (B_2O_3) equivalent to 0·4834 per cent. of boric acid (H_3BO_3) and to 33·838 grains of boric acid per pound, and was therefore adulterated contrary to the provisions of s. 6 of the Sale of Food and Drugs Act, 1875. (1)

Upon the hearing of the information the following facts were admitted or proved:—

The respondent was an inspector duly appointed by the Corporation of the Royal borough of Kensington under the Sale of Food and Drugs Acts, 1875 to 1907; and the appellant was the proprietor of a shop in the borough in which he carried on the business of a dairyman.

On June 27, 1911, Richard Lewis Brown, who was an assistant to the respondent, went to the appellant's premises and demanded and purchased half a pint of cream, for which he paid 9*d*. Nothing was said by the appellant when the sale was made, but immediately opposite to the entrance of the shop there was a notice exhibited in the words following:—

"Notice.

"All cream sold at this establishment contains a small proportion of boron preservative (not exceeding one half of 1 per cent.) to keep it sweet and wholesome, which has been the recognized method of preservation for over twenty years."

Brown saw and read the notice before he was supplied with the cream. The notice was clearly displayed to and could be read by any purchaser.

(1) 38 & 39 Vict. c. 63, s. 6: "No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding twenty pounds; provided that an offence shall not be deemed to be committed under this section in the following cases; that is to say,

"(1.) Where any matter or ingredient not injurious to health has been added to the food or drug because the same is required for the production or preparation thereof as an article of commerce, in a state fit for carriage or consumption, and not fraudulently to increase the bulk, weight, or measure of the food or drug, or conceal the inferior quality thereof.

". . . . . ."

Brown handed the cream to the respondent, who entered the shop immediately after the purchase was completed and notified to the appellant his intention of having the same analysed by the public analyst, and divided the sample into three parts as required by law. The appellant drew the attention of the respondent to the fact that the notice was exhibited, and the respondent copied the words of the notice, which he had in fact seen before his attention was drawn to it by the appellant.

The certificate, dated July 6, 1911, of the public analyst for the borough of Kensington in respect of the sample submitted to him was put in evidence and, omitting formal parts, was as follows:—

"I am of opinion that the said sample contained the percentages of foreign ingredients as under:—

"0·273 per cent. of boron trioxide (B_2O_3) equivalent to

"0·4834 per cent. of boric acid (H_3BO_3) and to

"33·838 grains of boric acid per pound.

"Observations.

"The sample had undergone no change which would affect the result of the analysis.

"The percentages above stated show the amount of boric acid in that portion of the divided article submitted to me for analysis."

There was no medical or chemical evidence before the justices beyond the above certificate.

The Royal borough of Kensington had issued a notice stating that in every case in which boric acid was found in cream to a quantity exceeding 17½ grains per pound they would cause proceedings to be taken against the vendor under the Sale of Food and Drugs Acts, but there was no proof that such a notice had been actually delivered to or had reached the hands of the appellant.

One half of 1 per cent. was equivalent to 35 grains to the pound.

It was contended on behalf of the appellant that he had committed no offence within the meaning of s. 6 of the Sale of Food and Drugs Act, 1875, inasmuch as by the notice which he exhibited in his shop, and which had been read by the purchaser

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before the purchase by him, he had stated that the cream contained boron preservative, and that the quantity of preservative actually contained in the cream was less than the amount indicated in the notice, and that, the purchaser having notice of the nature of the article which he was purchasing and electing to deal upon that footing, the transaction was not a sale to his prejudice within the meaning of the section. *Sandys* v. *Small* (1) and other cases were referred to with reference to notice to the purchaser. It was pointed out on behalf of the appellant that the proceedings in this case were taken under s. 6 of the Act of 1875 and not under s. 3 of that Act, and that there was no allegation in the summons that the article was rendered injurious to health, and that no evidence to that effect had been given.

The appellant did not call any evidence, nor did he contend that the presence of boric acid in the cream to the amount certified was not injurious to health, or was required for the production or preparation of the cream as an article of commerce in a state fit for carriage or consumption, and not fraudulently to conceal the inferior quality thereof.

It was contended on behalf of the respondent:

(*a*) That the presence of boric acid in the cream to the extent mentioned in the public analyst's certificate altered the nature, substance, and quality of the article demanded by the purchaser, and that the article sold was not of the nature, substance, and quality of the article demanded.

(*b*) That the notice exhibited by the appellant in regard to the article was misleading, and also was wholly insufficient to indicate that the article sold was not of the nature, substance, or quality of the article demanded by the purchaser, and that the appellant was not protected by such notice.

(*c*) The respondent alleged, but did not call evidence to prove, that the article sold was rendered injurious to health by reason of the presence of boric acid in the quantity stated, and in support of his allegation he relied on the decision in *Cullen* v. *McNair* (2) that the presence of boric acid in cream of an appreciably less amount than in the present case, namely, 21·91 grains per pound, must be regarded as injurious to the

(1) (1878) 3 Q. B. D. 449. (2) (1908) 99 L. T. 358.

health of certain classes of persons, namely, invalids and infants.

(*d*) That the sale was to the prejudice of the purchaser and was an offence under s. 6 of the Sale of Food and Drugs Act, 1875.

(*e*) That under s. 6 in order to escape conviction the onus was on the appellant to prove that the presence of boric acid in such quantity as was certified to be present in the cream sold by him was not injurious to health, or was required for the production or preparation of the cream as an article of commerce in a state fit for carriage or consumption and not fraudulently to conceal the inferior quality thereof.

The justices found that the article sold by the appellant to the purchaser was not of the nature, substance, and quality of the article demanded by the purchaser; that the notice exhibited by the appellant did not give notice to the purchaser or to any purchaser that the article sold was not of the nature, substance, and quality of the article demanded, and that the sale was to the prejudice of the purchaser. They also found (if material) that the article was injurious to health. They found that an offence under s. 6 of the Sale of Food and Drugs Act, 1875, had been committed, and accordingly convicted the appellant and ordered him to pay a penalty of 2*l.* and costs.

The question for the opinion of the Court was whether the justices upon the above statement of facts came to a correct decision in point of law.

Macmorran, K.C. (*Glyn-Jones* with him), for the appellant. Where the purchaser has notice that the article he is buying is mixed with something else, and he chooses to buy it, the seller is not guilty of an offence under s. 6 of the Sale of Food and Drugs Act, 1875: *Sandys* v. *Small* (1); *Gage* v. *Elsey* (2); *Pearks, Gunston & Tee* v. *Houghton*. (3) The sale in such a case is not to the prejudice of the purchaser. It is irrelevant to the question whether an offence has been committed under the main provision of s. 6 that the ingredient with which the article is mixed is

(1) 3 Q. B. D. 449. (2) (1883) 10 Q. B. D. 518.
(3) [1902] 1 K. B. 889.

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injurious to health. That is a relevant consideration if the prosecution is under s. 3 of the Act, or if the seller relies upon the first proviso in s. 6 or upon the provisions of s. 8 as to giving a label at the time of the delivery of the article. The first proviso in s. 6 only comes into operation where an offence would be committed under the preceding part of the section, that is, where there is no notice to the purchaser that the article is mixed, and then the proviso says that it shall not be an offence where any matter or ingredient not injurious to health has been added to the article because it is required for the production or preparation thereof as an article of commerce, and not fraudulently to increase its bulk, weight, or measure, or conceal the inferior quality thereof. The sale is not to the prejudice of the purchaser, even though the article is mixed with an ingredient which is injurious to health, if at the time of sale the purchaser has notice that the article is mixed with a particular ingredient. The purchaser in the present case had notice that he was buying cream mixed with a small quantity of boron preservative not exceeding one half of 1 per cent., and the amount of boron preservative in the cream which he purchased was less than that stated in the notice. The respondent received what he was told he would receive, and if he did not know what boron preservative was, he might have inquired before purchasing, and he cannot now complain that the sale was to his prejudice because he did not choose to do so. Further, there was no evidence before the justices that the percentage of boric acid in the cream was injurious to health, and they were not entitled to assume it without evidence. In *Cullen* v. *McNair* (1), upon which apparently the justices found that the cream so mixed was injurious to health, there was a finding of fact by the quarter sessions upon evidence given before them that a less quantity of boric acid in cream than there was in the present case was injurious to health, and this Court were bound by that finding, there being evidence to support it. The justices misunderstood that case.

Manisty, K.C. (*D. M. Hogg* with him), for the respondent. The object of a notice is to tell the purchaser what he is buying.

(1) 99 L. T. 358.

The notice must be clear and specific: *Dawes* v. *Wilkinson*. (1) In *Sandys* v. *Small* (2) the notice was that "all spirits sold here are mixed," and the Court held that it was sufficient to tell the purchaser that he was buying whisky mixed with water. In the present case the notice that the cream contained "a small proportion of boron preservative (not exceeding one half of 1 per cent.) to keep it sweet and wholesome" was not sufficient to call the attention of an ordinary purchaser to the fact that he was buying cream with an admixture of 33 grains of boric acid to the pound. The onus was on the appellant to prove that he informed the purchaser of the nature of the mixture. There was no evidence that 33 grains of boric acid to the pound was necessary to keep the cream sweet and wholesome. A purchaser reading that notice would think that the cream contained some harmless ingredient, not injurious to health, for the purpose of keeping the cream sweet and wholesome. He is not told what boron preservative is, nor even that it contains boric acid. "Boron preservative" is a coined expression to avoid the use of the technical term boric acid, and the appellant called no evidence to shew that boron preservative was a well-known article of commerce consisting of ingredients in certain definite proportions. There was no evidence that the proportion of boric acid in boron preservative is the same in all cases. The notice does not convey to the purchaser's mind that he is buying cream mixed with boric acid in such a quantity that it may be injurious to health. It conveys to an ordinary purchaser that the cream is fresh cream, not preserved cream: *Cullen* v. *McNair* (3); and the purchaser would expect only such an addition as would be sufficient to keep the cream fresh. The notice was therefore misleading. Inasmuch as the notice stated that the preservative used was to keep the cream "sweet and wholesome," and as boric acid, if added in sufficient quantity, might render the cream injurious to health, it lay upon the appellant to shew that the amount of boric acid in the cream was such as not to render it injurious to health. The justices were therefore right.

Macmorran, K.C., in reply, referred to *Higgins* v. *Hall*. (4)

(1) [1907] 1 K. B. 278.
(2) 3 Q. B. D. 449.
(3) 99 L. T. 358.
(4) (1886) 51 J. P. 293.

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LORD ALVERSTONE C.J. I have felt some doubt in this case, but I have come to the conclusion that the appellant is entitled to succeed. The information is laid, not under s. 3 of the Sale of Food and Drugs Act, 1875, but under s. 6, and therefore in order to convict the appellant there must have been a sale to the prejudice of the purchaser. It seems to me that the result of the authorities to which our attention has been called is that if the purchaser is informed at the time of purchase that the article which he is buying is an article mixed with something else he cannot say that he is prejudiced on the ground that he thought he was buying a pure article. The sale in such a case is not prima facie to the prejudice of the purchaser. That seems to me to be the effect of the case of *Sandys* v. *Small* (1) and the other cases to which we have been referred. *Sandys* v. *Small* (1) also shews that the knowledge may be brought to the mind of the purchaser not only by means of a label under s. 8, but also by a notice such as was given in this case. The notice was as follows: "All cream sold at this establishment contains a small proportion of boron preservative (not exceeding one half of 1 per cent.) to keep it sweet and wholesome, which has been the recognized method of preservation for over twenty years." The justices have found that the purchaser saw and read the notice before he was supplied with the cream. In my opinion I ought not to come to the conclusion that an ordinary purchaser would not know what that notice meant. I should myself have been more satisfied if it had been found in the case that boron preservative was a known and definite article, but it seems to me that if the suggestion had been that boron preservative was not a definite article containing a definite quantity of boric acid there would not have been the statement in the case that one half of 1 per cent. of the preservative in the cream meant that there were 35 grains of boric acid to the pound. The notice, therefore, must be taken to have indicated that a maximum quantity of 35 grains of boric acid to the pound might have been added to the cream. A quantity of boric acid less than that amount was found in this cream, and therefore the sale was not to the prejudice of the purchaser.

(1) 3 Q. B. D. 449.

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I felt for some time a difficulty with regard to the first proviso in s. 6, and though my difficulty is not altogether removed I have come to the conclusion that I ought to accept the view which has been put before us on behalf of the appellant that the proviso only becomes material in cases where it is proved that there has been a sale to the prejudice of the purchaser. If that is so, and if I am right in coming to the conclusion that the sale is not to the prejudice of the purchaser if he is informed that the article he is buying is mixed with another article, the proviso has no application, and therefore the provision therein that no offence shall be deemed to be committed where any matter or ingredient not injurious to health has been added does not apply. If it is intended to allege that an offence has been committed by adding to the article of food an ingredient which is injurious to health, proceedings can be taken under s. 3. It is said that the purchaser was misled by the notice, because he would be led to suppose from the words "to keep it sweet and wholesome" that some small proportion of a harmless preservative had been added so as to keep the cream sweet and wholesome. I do not think that we ought to give effect to that suggestion in view of the fact that the preservative with which the cream is mixed is named as well as the maximum proportion of that preservative. As I have said, I should have been more satisfied if it had been stated that boron preservative was a known article composed of definite ingredients, but I cannot act on the view that a purchaser who was told that the cream was mixed with boron preservative would not know what it was mixed with.

I desire to make one observation with regard to the case of *Cullen* v. *McNair* (1) because the justices may possibly have misconceived the decision in that case. They seem to have thought that this Court decided that a certain percentage of boric acid, less than that in the present case, added to the cream made the cream injurious to health, and that therefore they ought to convict. In that case, however, the proceedings were taken under s. 3, and there was evidence before the justices that the quantity of boric acid made the cream injurious to the health of infants

(1) 99 L. T. 358.

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and invalids, and the justices so found, and upon that finding based upon evidence this Court decided the case.

In my opinion the appeal must be allowed and the conviction quashed upon the ground that there is no evidence upon which the justices were entitled to find that the sale was to the prejudice of the purchaser within the meaning of s. 6.

PICKFORD J. I am of the same opinion. The result of the cases which have been cited to us seems to me to be this, that in a prosecution under s. 6 of the Sale of Food and Drugs Act, 1875, if the purchaser has been informed that the article he is buying is a mixed article he cannot complain if he receives an article which is mixed, though he may not have been told what is the exact nature of the ingredient with which the article has been mixed, or the effect of the mixture. When therefore the purchaser in the present case was informed that the cream contained a small proportion of boron preservative he knew that he was buying cream mixed with boron preservative, and if he did not know what boron preservative was—and I doubt if an ordinary customer would know—he cannot complain, because, having been informed that the cream was mixed with a substance the nature of which he did not understand, he chose to buy the cream so mixed. If the substance with which the cream is mixed is injurious to health a prosecution can be instituted under s. 3. In the present case the prosecution is under s. 6, and in the circumstances the sale was not to the prejudice of the purchaser.

AVORY J. I am of the same opinion. It seems to me that the justices have taken a wrong view of s. 6. They appear to me to have thought that it was incumbent upon the appellant to shew that the ingredient which was added to the cream was not injurious to health, and that it had been added because it was required for the production or preparation of the cream as an article of commerce, and not fraudulently to increase its bulk, weight, or measure or to conceal its inferior quality; and that, as the appellant had not proved those matters, or any of them, it followed that the sale was to the prejudice of the purchaser. In

my opinion the justices took a wrong view of the proviso in s. 6. The proviso only comes into operation in a case where there has been a sale to the prejudice of the purchaser. The question which we have to consider is whether there was any evidence before the justices that the sale was to the prejudice of the purchaser. I am of opinion that there was none, even if the expression " boron preservative " does not convey any clear idea to the mind of an ordinary purchaser. My impression is that it does convey a sufficiently clear idea to the mind of an ordinary purchaser, but even if it does not our present decision will not impair the useful purpose of this Act, because there is no obligation upon a person to buy anything to which he finds a notice of this kind attached. The notice clearly informs anybody who comes into the shop that the cream sold is not pure cream. It is obviously a notice that something has been added to it to preserve it, and if a person wants pure cream without anything added he need not buy this cream. Therefore I do not think that our decision in any way detracts from the usefulness of the Act.

Appeal allowed.

Solicitors for appellant : *Neve, Beck & Kirby.*
Solicitors for respondent : *Pontifex, Pitt & Johnson.*

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[IN THE COURT OF APPEAL.]

KELSEY AND OTHERS *v.* DOUNE.

Practice—Trial—Unconditional Leave to Defend—Right of Defendant to Trial by Jury—Order XIV.—Order XXXVI., r. 6.

Upon an application under Order XIV. for leave to sign final judgment a Master gave unconditional leave to defend and ordered the trial to be before a judge in Middlesex. This order was affirmed on appeal by a judge in chambers, but was not further appealed against. The defendant subsequently applied under Order XXXVI., r. 6, for a trial with a jury:—

Held, that the fact that the order directing a trial by a judge had not been appealed against was fatal to the application for trial by a jury.

Wolfe v. *De Braam* (1899) 81 L. T. 533, and *Macartney* v. *Macartney* (1909) 25 Times L. R. 818, considered.

APPEAL from chambers.

The action was brought to recover a sum of money paid by the plaintiffs for, and at the request of, the defendant. The plaintiffs took out a summons under Order XIV. for leave to sign final judgment, and on September 28, 1911, the Master made an order in the following terms:—"That the defendant be at liberty to defend this action, and that the defendant's counter-claim be delivered by October 12, 1911, and the plaintiffs' reply seven days after. And it is ordered that the action be tried by a judge in Middlesex." (1) The plaintiffs appealed, and on October 17 Lush J. made an order that the appeal be dismissed and that the defence and counter-claim be delivered in ten days. On November 6, 1911, the plaintiffs gave the defendant

(1) Order XIV., r. 6: "Leave to defend may be given unconditionally, or subject to such terms as to giving security or time or mode of trial or otherwise as the judge may think fit."

Order XIV., r. 8 (*a*): "Where leave, whether conditional or unconditional, is given to defend, the judge shall have power to give all such directions as to the further conduct of the action as might be given on a summons for directions under Order XXX., and may order the action to be forthwith set down for trial."

Order XXXVI., r. 6: "In any other cause or matter, upon the application within ten days after notice of trial has been given of any party thereto for a trial with a jury of the cause or matter or any issue of fact, an order shall be made for a trial with a jury."

notice of trial in Middlesex by a judge alone. Next day the defendant took out a summons for further directions, in which he asked (1.) that the trial of the action should be by a judge and common jury, and (2.) for discovery of documents. This summons was heard on November 14, when the Master ordered "that the defendant's application for the trial of this action with a jury be dismissed." An appeal by the defendant to Scrutton J. was dismissed. The defendant now appealed to the Court of Appeal.

Lort Williams, for the defendant. The order of the Master under Order XIV. gave the defendant unconditional leave to defend; the direction as to trial by a judge was a direction only and was not a condition of leave to defend being given; it is the common order when leave is given to defend. The order was, perhaps, appealable; but the proper course for a defendant to take who wanted a jury was to make a substantive application under Order XXXVI., not to appeal. In the notes to the Annual Practice, vol. 1, p. 916, it is said that "The Master has no power by ordering trial without a jury to deprive either party of his right to a jury under Order XXXVI., rr. 2, 6," and similarly in the Yearly Practice, at p. 366, it is said, "If unconditional leave to defend is given under Order XIV., the defendant may subsequently apply on notice for a trial by jury," and reference is made to the cases of *Wolfe* v. *De Braam* (1) and *Macartney* v. *Macartney*. (2) It was unnecessary to appeal against the Master's order, for it is plain that under Order LIV., r. 32, the mode of trial may be subsequently altered by an order made on a summons. The rules are inconsistent, for under Order XXXVI., r. 2, there is absolute right to a jury in certain actions. The proper view of the rules is that taken in the Practice books.

W. de B. Herbert, for the plaintiffs, was not called upon.

VAUGHAN WILLIAMS L.J. It is unfortunate that there has been no appeal from the original order of the Master made upon the application for leave to sign final judgment; the more so because,

(1) 81 L. T. 533. (2) 25 Times L. R. 818.

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when we look at the comments in the Annual Practice and the Yearly Practice, they both seem to support to a large extent the view presented on behalf of the appellant and to suggest that the result of Order xxxvi., r. 6, is that the right to a trial by jury in cases other than those comprised in the expression "in any other cause or matter" is an absolute right. This appears to be the view of the meaning of that rule taken in both those books. In the Yearly Practice it is said, "This rule applies to cases set down for trial under Order xiv., r. 8 (*b*), unless conditional leave to defend has been given upon terms that the trial be without a jury," and *Wolfe* v. *De Braam* (1) and *Macartney* v. *Macartney* (2) are cited. The passage as it stands seems to mean that, unless trial by a judge alone is made a condition of leave to defend, Order xxxvi., r. 6, applies, and there is an absolute right to a trial by jury unless the case comes within the classes of cases previously excepted by rr. 3, 4, and 5. The same view is expressed in different language in the notes to Order xxxvi., r. 6, in the Annual Practice. But upon looking at the cases of *Wolfe* v. *De Braam* (1) and *Macartney* v. *Macartney* (2), I think they hardly support the proposition as laid down in the Practice books. Looking at the judgment of A. L. Smith L.J. in the former case, it begins by setting out the facts, which shew that his judgment in no way supports the proposition that in a case where the Master on a summons under Order xiv. directs a trial by a judge without a jury, there is still a right, while leaving his order unappealed, to go under Order xxxvi., r. 6, for an order for trial with a jury. The learned Lord Justice says: "The plaintiff applied for summary judgment under Order xiv. The Master gave the defendant unconditional leave to defend, and further ordered that the case should be tried before an official referee. The plaintiff appealed to the judge at chambers, and objected to unconditional leave to defend being given to the defendant. The judge (Lawrance J.) affirmed the order of the Master giving unconditional leave to defend, but ordered that the action should be put into the short cause list for speedy trial. That was all that the judge did by his order which has been drawn up." I need read no further; it does not touch the case where a Master or judge upon such an

(1) 81 L. T. 533. (2) 25 Times L. R. 818.

application makes an order for trial by a judge without a jury. No affirmative order at all as to the mode of trial was made upon the application in *Wolfe* v. *De Braam* (1); the only order was that the cause should be placed in the short cause list; and that case is applicable only to this extent: that it is not true to say that an order which contains a direction to place a cause in the short cause list excludes the right of the defendant to apply for a trial by jury under Order XXXVI., r. 6. That is really sufficient to distinguish the case, but the judgment is very instructive, and perhaps I may read further. "It is said that he then exercised his discretion as to allowing a trial with a jury, but that is denied. However, the order as drawn up is simply that there should be unconditional leave to defend, and that the action should be put into the short cause list. That was the end of the application under Order XIV. The defendant then applied to the Master, upon the summons for directions, for an order for a trial with a jury; the Master was told that Lawrance J. had already refused a jury, and thereupon the Master referred the application to the learned judge. By the appellant it is said that Lawrance J. held that, as the action was entered in the short cause list, there could not be a jury, and that he refused the application on that ground. By the respondent it is said that the learned judge exercised his discretion and thought that the case was not one proper to be tried with a jury. I am not satisfied that the learned judge exercised any discretion. How could he have exercised any discretion upon this application? Under the provisions of Order XIV., r. 6, he might have said that the trial should be without a jury as a condition of giving leave to defend. That rule provides that 'leave to defend may be given unconditionally, or subject to such terms as to giving security or time or mode of trial or otherwise as the judge may think fit.' If the learned judge acted upon the view that there could not be a trial with a jury when a case was put into the short cause list, I think that he was wrong, because of the provisions of Order XXXVI., r. 6, that 'in any other cause or matter, upon the application, within ten days after notice of trial has been given, of any party thereto for a trial

(1) 81 L. T. 533.

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with a jury of the cause or matter or any issue of fact, an order shall be made for a trial with a jury.' Therefore, if the application is made within the proper time and the case is not one of those excepted by rr. 3, 4 and 5 of Order xxxvi., the judge has no discretion, and must make an order for trial with a jury. The learned judge, therefore, had no discretion upon this application to refuse an order for a trial with a jury, and ought to have made an order for trial with a jury." I read that as shewing conclusively that in *Wolfe* v. *De Braam* (1) no such proposition can have been laid down as appears in the Practice books. It is desirable also to read what Collins L.J. said in that case. "I am of the same opinion, solely upon the ground of the form of the order made by Lawrance J. upon the application under Order xiv., which does not impose any terms as to the trial being without a jury as a condition of giving leave to defend." That is like the present case. And Collins L.J. also says: "If I were satisfied that the learned judge had, upon that application, exercised his discretion as to the trial being without a jury, I could not interfere. But the difficulty is that there is nothing in the order made under Order xiv. as to the trial being without a jury." I have nothing to add to this expression of opinion except that I, like Collins L.J., have a doubt whether a judge or a Master has power under Order xiv., r. 8 (*a*), to make an order as to the mode of trial.

In the present case there has been no appeal from the original order of the Master, nor is it surprising; for those advising the defendant appear to have been misled by the description in the Practice books of the effect of the decisions in *Wolfe* v. *De Braam* (1) and *Macartney* v. *Macartney* (2); but such a consideration cannot affect the rights of the parties. An order was made, which may have been right or may have been wrong; there is, however, no appeal from it, and as between the two litigants that fact overrides the provisions of Order xxxvi., r. 6. There is nothing in our decision to affect the construction of that Order; all we say is that in face of an order which has not been appealed we cannot go into the question whether it is right or wrong, but

(1) 81 L. T. 533. (2) 25 Times L. R. 818.

that as between these two parties we must hold that there is no right to a trial by jury.

BUCKLEY L.J. I am of the same opinion. On September 28 the Master, upon a summons for leave to sign final judgment under Order XIV., made an order which, so far as leave to defend was concerned, gave unconditional leave. It is I think clear that the leave to defend was not made conditional upon there being no jury. Under Order XIV., r. 8 (*a*), there is in such a case "power to give all such directions as to the further conduct of the action as might be given on a summons for directions under Order XXX.," which is the Order under which directions are ordinarily given upon a summons taken out for that purpose. Order XXX., r. 2, deals with orders for directions as to interlocutory proceedings, and among other matters as to "place and mode of trial," and it provides that the order for directions shall be in the Form No. 4A, Appendix K, with such variances as circumstances may require. The form in actual use appears to be Form 4B in Appendix K, which in dealing with the mode of trial undoubtedly contains words as to trial by a jury; one question, therefore, that might arise and have to be dealt with in an application under Order XIV., r. 8 (*a*), is whether there should be a jury or not.

It is further provided (inter alia) by Order LIV., r. 32, that "The order made on the summons for directions in every action or matter, and every order giving leave to defend under Order XIV., shall direct whether the action is to be tried with a special jury or with a common jury, or without a jury (whether by a judge or otherwise) . . . ." Those being the provisions of the rules, the Master, after giving unconditional leave to defend, wrote down the words "judge, Middlesex" as part of his order; whereupon counsel for the defendant claimed to be heard as to whether there should be a jury or not. He was heard, and the Master declined to strike the word "judge" out of his order, but allowed it to stand; and eventually by the order as drawn up the action was ordered to be tried by a judge in Middlesex. The plaintiff appealed from this order to Lush J., who on October 17 dismissed the appeal.

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Buckley L.J.

Nothing further took place till November 7, when the defendant sought to avail himself of his right to a jury under Order xxxvi., and took out a summons under r. 6 of that Order asking for an order that the trial should be with a jury. The Master dismissed the summons, and his decision was affirmed by Scrutton J., from whose decision the present appeal is brought. On September 28 the Master, and on October 17 the judge on appeal, had adjudicated upon the issue whether there should be a jury or not; and they both decided that the trial should be without a jury. That order was never appealed against. The defendant's counsel contended that, though that order is a subsisting order, it was one which was capable of alteration for sufficient cause under Order liv., r. 32, and that it is of no effect if a party bound by it applies for a trial by jury under Order xxxvi., r. 6. As I read that rule, the defendant had under it a right to a trial with a jury, if the action came within the expression "in any other cause or matter." But both the Master and the judge must have adjudicated upon that question when the case was before them. The Master may have thought, when the matter was discussed before him, that the case fell within Order xxxvi., r. 5, rather than Order xxxvi., r. 6, or he may not; at any rate, he had some reason for exercising the power of saying that there should be no jury; so, too, must the judge, from whose decision there was no appeal. Under the circumstances I do not think it is possible to say that the right to a jury survives. There would be no good in the parties being heard on the question of jury or no jury upon the hearing of a summons under Order xiv., if the defeated party on that occasion could afterwards demand a jury under Order xxxvi., r. 6. I think, therefore, that if, upon an application under Order xiv., the question of jury or no jury is discussed and decided, and no appeal is brought against the decision, it cannot afterwards be questioned or set aside by an application under Order xxxvi., r. 6.

But it is said by the defendant that there are authorities to the contrary, and two cases have been cited, the first of which is *Wolfe* v. *De Braam*.(1) That decision has no application to the

(1) 81 L. T. 533.

facts of the present case, for in that case no order had been made as to the mode of trial, that is, whether it should be with or without a jury, the only order being that the action should be placed in the short cause list. That case does not decide the present. It is plain from the judgment of Collins L.J. that, if the facts of that case had been the same as those before us, the Court of Appeal would have held that the judge had a discretion on a summons under Order XIV. to order a trial without a jury and that they would have declined to interfere. There are dicta in that case unfavourable to the contention of the present defendant. Then came the case of *Macartney* v. *Macartney* (1), which, however, does not affect the case now under consideration. It raised the point whether an order that a case be put in the short cause list, made upon an application under Order XIV., precluded a subsequent application under Order XXXVI., r. 6, for a trial by jury, and it was held that it did not preclude such an application. In my opinion these decisions are cited in the notes to Order XXXVI., r. 6, both in the Annual Practice and the Yearly Practice, as authorities for a proposition which they do not support. The defendant, not having appealed against a subsisting order under Order XIV. directing a trial without a jury, cannot now succeed in demanding a trial with a jury under Order XXXVI., r. 6.

KENNEDY L.J. I have come to the same conclusion. I agree that the rules are not easy to reconcile, but some things in them, at any rate, are plain. Where the judge or Master, in dealing with an application under Order XIV., gives a defendant leave to defend, whether conditional or unconditional, he has power under r. 8 (*a*) of that Order to give all such directions as to the further conduct of the action as might be given on a summons for directions under Order XXX. That rule is permissive only, but, if such directions are given, the ordinary rules as to appeals from interlocutory orders apply to such an order; therefore, when this order was made, by which the mode of trial was prescribed, the defendant should have appealed, if he objected to it, at once. In practice it is not unusual, where the

(1) 25 Times L. R. 818.

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parties are not agreed as to the mode of trial, to leave a blank space in the order, to be subsequently filled up by agreement. Here there has been no appeal from an order which included a direction that the trial should be without a jury, and the defendant says that, though he did not appeal, he nevertheless has a right to have an order for a trial with a jury under Order xxxvi., r. 6. In my judgment that contention cannot be sustained. I do not wish to repeat the comments of the other members of the Court upon the cases cited and upon the notes upon them in the Practice books; I entirely concur in those comments. But I should wish to point out that Order liv., r. 32, while providing that every order giving leave to defend made upon an application under Order xiv. is to direct whether the action is to be tried with a special jury or with a common jury or without a jury, goes on to say that the mode of trial as directed may be subsequently altered for sufficient cause on a summons or a notice under the summons or order for directions issued by either party. It is difficult to construe that rule consistently with the contention that, although the order made has not been appealed, there is an absolute right under Order xxxvi., r. 6, to a trial with a jury. This appeal, in my judgment, fails.

Appeal dismissed.

Solicitors for plaintiff: *Syrett & Sons.*
Solicitor for defendant: *W. M. Pyke.*

W. J. B.

In re FISHER & SONS.

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April 24.

Bankruptcy—Practice—Executors carrying on Testator's Business in his Firm Name—Receiving Order against Firm—Application to adjudicate—Whether Executors are Partners—Partnership Act, 1890 (53 & 54 *Vict. c.* 39), *s.* 1—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 20, 115—*Bankruptcy Rules*, 1886, *rr.* 260, 262, 264.

Executors carried on their testator's business under the powers of his will in the same firm name in which he had carried it on. Subsequently a receiving order was made against them in the firm name on a bankruptcy petition by a creditor who had recovered judgment against them in the King's Bench Division in the firm name on two dishonoured bills of exchange accepted in the firm name :—

Held, that the executors were not liable to be adjudicated bankrupt as partners.

THIS was an application that raised the question whether executors could be adjudicated bankrupt as partners in these circumstances.

E. W. Fisher by his will, dated September 6, 1899, after appointing his wife and George Fisher and Francis George Grimwade to be the executors and trustees of his will, empowered them to carry on his business for the benefit of his wife for her life. The testator at the time of his death in 1903 was carrying on business alone in the firm name of "E. W. Fisher & Sons," and after his death his executors continued to carry on the business in that firm name.

Early in December, 1911, a creditor who had supplied the executors with goods for the business issued two writs in the King's Bench Division against them in the firm name on two dishonoured bills of exchange accepted in the firm name for sums amounting together to 113*l.* odd. An appearance was entered to each writ by "Caroline Fisher, George Fisher and Francis George Grimwade sued and trading as E. W. Fisher & Sons." On December 11 the creditor obtained judgment on both writs under Order XIV., and on January 3, 1912, presented a bankruptcy petition against the firm, the act of bankruptcy being their non-compliance with a bankruptcy notice based on each judgment debt and stated to have been served on

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December 14, 1911, on George Fisher, one of the partners, at the principal place of business of the firm. On January 26, 1912, a receiving order was made on the petition against the firm.

In March, 1912, the official receiver applied under s. 20 of the Bankruptcy Act, 1883, and r. 264 of the Bankruptcy Rules, 1886, that "Caroline Fisher, George Fisher and Francis George Grimwade constituting the said firm of E. W. Fisher & Sons" might be adjudicated bankrupt.

The executors opposed the application on the ground that they were not partners, and the registrar, considering that the case involved two questions of difficulty and novelty, referred it to the judge. The registrar's report, so far as material, was as follows:—

"The two questions are (1.) whether these three persons, who are executors and trustees carrying on a business under the express direction of a testator with a part of his assets, are partners within the meaning of s. 115 of the Bankruptcy Act, 1883, and the Bankruptcy Rules 259—264, so that they all or any one or more of them commits an act of bankruptcy by non-compliance with a bankruptcy notice served on one of them in their firm or trading name under the Bankruptcy Rule 260 by delivering it to one of them, the alleged partners, at the principal place of business of the firm; (2.) whether, assuming them not to be partners, but co-owners of the business in some other legal relation to one another, they may be proceeded against in the firm name under s. 115 of the Bankruptcy Act, 1883, and the Rules as being within the words 'any person carrying on business under a partnership name' as distinguished from 'any two or more persons being partners.'

"I am not aware of any authority on either point, but on the first point I may refer to Lindley on Partnership, 7th ed., p. 10, and Pollock's Digest of the Law of Partnership, 8th ed., p. 8. Lindley says that the division of profits 'appears to be rather an accident than of the essence of the partnership relation.' Sir F. Pollock says 'This opinion is certainly novel and I am unable, with great respect for the present learned editor of Lindley on Partnership, to see any sufficient reason for accepting it.'

"I may add that I am proceeding on the assumption, which I believe to be correct, (1.) that in order to make any individual

person bankrupt the applicant for adjudication must prove that such individual person has committed an act of bankruptcy. (2.) That the appearance in the action by the three executors does not estop them from now contesting the allegation that they are liable to adjudication as partners: see *Re Frances Handford & Co.* (1)

"The official receiver does not now desire to proceed with the application, but the petitioning creditor desires to carry it on."

H. D. Samuels, for the petitioning creditor. The executors were sued in the King's Bench Division as partners in their firm name and entered an appearance to the writ as partners, and it is too late for them now after judgment to object that they are not partners. Partnership is defined by s. 1 of the Partnership Act, 1890, to be "the relation which subsists between persons carrying on a business in common with a view of profit," and it is submitted that these executors come within that definition. They are carrying on business in common for profit, and it is immaterial for whose benefit or profit they are carrying it on. They are persons carrying on business under a partnership name within the meaning of s. 115 of the Bankruptcy Act, 1883, and the Rules thereunder.

A. Kapadia, for the executors, was not called upon.

PHILLIMORE J. I think this application fails and must be dismissed. I do not think that these executors are partners within the meaning of s. 1 of the Partnership Act, 1890, or of s. 115 of the Bankruptcy Act, 1883. No doubt they are joint debtors and can be individually proceeded against and made bankrupt. But they are not partners, and it may be that the assets of the business form part of their testator's estate.

Solicitors: *H. H. Harper; Borrowdale & Co.*

(1) [1899] 1 Q. B. 566, 569, 570.

H. L. F.

1912
April 25.

In re PRIGOSHEN.

Ex parte OFFICIAL RECEIVER.

Bankruptcy—Deed of Assignment—Key of Business Premises left with Trustee—Composition—Trustee authorized by Creditors not to enforce Deed—Key returned to Debtor—Bankruptcy of Debtor—Liability of Trustee of Deed to account to Trustee in Bankruptcy.

A debtor assigned by deed his stock in trade and effects at his business premises to a trustee for the benefit of his creditors, and, with a view to avoid a threatened distress, left the key of the business premises at the trustee's office. The trustee valued the stock in trade and prepared a statement of affairs for a meeting of the creditors at which a composition was accepted subject to its payment being guaranteed. Satisfactory guarantees were handed to the trustee, who, with the consent of the majority of the creditors, allowed the debtor to take away the key and did not proceed under the deed of assignment. Within three months the debtor became bankrupt and had no assets:—

Held, that the trustee under the deed had intermeddled with the estate and must account for the stock in trade and pay its value to the trustee in bankruptcy.

THIS was an application for an account against the trustee under a deed of assignment under these circumstances.

The debtor was a trader, and by a deed dated August 18, 1911, he assigned all his stock in trade and effects at his business premises to one Hawkins, an accountant, upon trust for the benefit of his creditors. Hawkins signed the deed and it was registered by the debtor's solicitors. A day or two previously the debtor, in consequence of a threatened distress for rent, had locked up his business premises and left the key at Hawkins' offices. On August 23 a meeting of the creditors, which had been called by the debtor's solicitors, was held at Hawkins' offices. For the purposes of the meeting Hawkins, on information supplied by the debtor, prepared a statement of affairs which shewed that the debtor's liabilities were 1213*l.* 9*s.* 4*d.*, and that his assets comprised the stock in trade, estimated at 248*l.* 2*s.* 3*d.*, fixtures 20*l.*, and book debts 11*l.*, making together 279*l.* 2*s.* 3*d.* Hawkins also instructed a licensed valuer to inspect and value the stock in trade, who valued it at 50*l.* At the meeting of

the creditors the statement of affairs and the valuation were considered, and the debtor offered a composition of 3*s.* 6*d.* in the pound, which the creditors accepted subject to satisfactory security being given and instructed Hawkins not to enforce the deed.

On September 14, 1911, two friends (not creditors) of the debtor gave Hawkins a written guarantee as follows:—

"Re B. Prigoshen.

"In consideration of the creditors of the above agreeing to accept a composition of three shillings and sixpence in the £ in the above matter in settlement of their claims, we hereby jointly and severally guarantee the due payment to you as trustee under the deed of assignment by the said B. Prigoshen of a composition of three shillings and sixpence in the £ together with all costs and expenses in the matter, and without prejudice in any way to our guarantee you are at liberty to allow the debtor to have the use of his stock in trade assigned to you under the deed."

About the same time the debtor obtained the signatures of the large majority of his creditors to the following document, which he handed to Hawkins:—

"We hereby authorise you as trustee under the deed of assignment to hand the stock over to the debtor, we being satisfied that the composition will be duly paid by the debtor."

A day or two afterwards Hawkins allowed the debtor to take away the key of the premises and did not proceed under the deed. On October 6, 1911, a dissenting creditor presented a bankruptcy petition against the debtor based on the deed of assignment as the act of bankruptcy, on November 1 a receiving order was made against him, and on November 10 he was adjudicated bankrupt and the official receiver became the trustee. In the meantime the debtor had realized his stock for about 53*l.* and had disposed of the proceeds and had no assets.

The official receiver applied to Hawkins for the property comprised in the deed of assignment and for an account. In reply Hawkins denied that he was liable to account in any way on the ground that he had received no moneys and had not taken possession of or dealt with the estate, and offered to hand over the

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guarantee. Correspondence ensued, and ultimately the official receiver made this application asking that Hawkins might be ordered to account for the assets or to pay their value.

F. Mellor, for the application. By the deed of assignment the property in the debtor's assets passed to Hawkins, he signed the deed and thereby accepted the trusts, and by virtue of the key he had possession. The official receiver is entitled to treat him as a trespasser and to require him to account for the assets or to pay the value of them : *Ex parte Vaughan.* (1)

Tindale Davis, for Hawkins. This application goes beyond any of the authorities. Hawkins did not take possession under the deed or interfere with the assets or intermeddle with them, and beyond receiving the guarantee for the composition he did not act under the deed in any way. The key was left at his office to avoid a distress for rent, and not as a symbol of delivery of possession nor to give him the control of assets: *Hartley* v. *Moxon.* (2) He had a mere paper title, and before he can be treated as a trespasser he must be shewn to have actually interfered and intermeddled with the assets. But he did nothing at all. He was the agent of the creditors, and it will be very hard on him if he is to be made liable to account for property of which he never had physical possession and which on the authority of the creditors he allowed the debtor to retain. He is only liable, if at all, for what actually came into his possession: *Ex parte Vaughan.* (3)

PHILLIMORE J. In this case I think that Hawkins, the trustee under the deed of assignment, did take possession of the property comprised in the deed so as to be accountable to the trustee in bankruptcy of the debtor. In the first place, it was his duty to take possession of it under the deed of assignment which he executed, thereby accepting the trusts of it. Secondly, the property was locked up in a shop and possession could be taken by the man who held the key of that shop, and the bankrupt brought that key to Hawkins, and he took it and

(1) (1884) 14 Q. B. D. 25. (2) (1842) 12 L. J. (Q.B.) 41.
(3) 14 Q. B. D. 25, 29, 30.

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Phillimore J.

kept it knowing that it was the key of the shop where the stock in trade assigned to him was stored. Thirdly, he decided to have a better valuation of the stock than that of the debtor and sent a licensed valuer, who must have actually handled the goods or caused them to be handled and who made a report and valuation for him. And fourthly, he purported on the authority of the assent of the majority of the creditors to deliver up the key of the shop to the debtor, which enabled the debtor to take possession of and to dispose of the stock. Whether he has any remedy against the creditors is not the question before me. In my opinion the trustee in bankruptcy is entitled to the order for which he asks, and I shall direct an account and payment of the value unless the parties can agree upon a figure to be inserted in the order.

Solicitors: *Tarry, Sherlock & King; Wake, Wild & Boult.*

H. L. F.

BARTLETT *v.* PARKER AND OTHERS.

1912

April 2.

Gaming—Lottery—Purchase of Chance—Gift of Prize—Money paid by Purchaser of Chance not used for Purchase of Prize—Gaming Act, 1802 (42 *Geo.* 3, *c.* 119), *s.* 2—*Lotteries Act,* 1823 (4 *Geo.* 4, *c.* 60), *s.* 41.

Tickets each bearing a different number were sold for 6*d.* each upon the terms that the purchaser of the ticket bearing a number to be subsequently drawn by an independent person should be entitled to a bicycle as a prize. The bicycle was presented as a gift by a firm of cycle manufacturers for the purposes of advertisement, no part of the money paid by the purchasers of the tickets being used for acquiring the bicycle:—

Held, that as each purchaser of a ticket bought a chance, and the holder of the ticket bearing the winning number was determined by chance, the scheme constituted a lottery within the meaning of the Lotteries Act, 1823, s. 41, and it was immaterial that no part of the money paid by the purchasers of the tickets was used for the purchase of the prize.

CASE stated by justices for the county of Somerset.

An information was preferred by the appellant against the respondent Albert Parker charging him with having on August 15,

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1911, at the borough of Chard unlawfully sold to one Reginald James Phillips a ticket or chance in a lottery by which a Rudge-Whitworth "crescent model" bicycle would be given to the holder of a ticket corresponding with the number of a ticket to be announced in a field in which a dance and al fresco concert were to be held on Saturday, August 19, 1911, from 6.30 to 10.30 P.M., entrance to the field being obtained by means of a numbered ticket previously sold for the sum of 6*d*.

The respondent Christopher Elswood was also charged by a similar information for that he on August 19, 1911, at the borough of Chard unlawfully did sell to one Ethel Tarling a certain ticket or chance in the lottery above mentioned.

The respondent John Howard Young (trading as "Young & Son"), of the borough of Chard, printer and publisher, was charged by an information for that he on August 12 and 19, 1911, at the borough of Chard unlawfully did publish a proposal or scheme for the sale of certain tickets or chances in the same lottery.

The respondent William Cornelius, of Chard, honorary secretary of the Chard Working Men's Tariff Reform Club, was charged by an information for that he on August 19, 1911, at the borough of Chard unlawfully and knowingly did suffer to be exercised or drawn a certain number in the same lottery.

At the hearing of the informations (which, by consent, were taken together) the following facts were proved or admitted:—

A bill was circulated in the town of Chard on and some days prior to August 19, 1911, the date when the dance and al fresco concert were to be held, of which the following (so far as material) is a copy:—

"Chard.

. . . . .

"A dance and al fresco concert . . . . will be held . . . . in a field opposite Furnham Vicarage by the kind permission of Mrs. B. L. Powne on Saturday, August 19, 1911, from 6.30 to 10 P.M.

. . . . .

[Then followed a list of names of persons from whom tickets could be obtained, including the respondents Parker, Elswood, and Cornelius.]

"Important Notice.

"A Rudge-Whitworth Crescent Model bicycle will be given to the holder of a ticket corresponding with a number (which will be announced on the field at 10 P.M.) secretly selected by an independent gentleman and all tickets will be numbered.

"This bicycle will be given by the Rudge-Whitworth Company, Coventry, and Press & Co., Fore Street, Chard (as an advertisement for their well-known machines).

. . . . . .

"Young and Son's Printing Works, Chard."

A similar advertisement to the bill appeared in a newspaper called *The Chard and Ilminster News* for August 12 and 19, 1911, and the respondent Young had admitted that he took the responsibility for printing the bill and publishing the newspapers for the dates above mentioned upon instructions from the respondent Cornelius.

On August 15, 1911, the respondent Parker sold to Reginald James Phillips, a boy aged eleven years, a ticket numbered 87 for 6*d.* for the dance and al fresco concert. Phillips bought the ticket with the hope of winning the bicycle and had read the bills about it. The printing on the ticket (so far as material) was as follows:—

"No. 87

. . . .

"Dance.

"Saturday, August 19th, 1911.

"Admission 6*d.*

"The holder is entitled to compete for a Rudge-Whitworth cycle given by Press & Co., Chard.

"(Particulars see bills.)"

On August 19, 1911, the respondent Elswood sold to Ethel Tarling a ticket numbered 218 for 6*d.* for the dance and al fresco concert (exactly similar, except the number on it, to the ticket sold to Phillips), and Ethel Tarling purchased the ticket simply for the purpose of attending the dance and not with the hope or view of having the winning number for the bicycle.

The dance and al fresco concert were held on August 19, 1911, from 6.30 to 10.30 P.M. in the field mentioned above belonging to Mrs. Powne of Chard. Admittance to the field was by numbered

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tickets for which 6*d.* each was charged; some persons came with tickets and others purchased them at the entrance to the field, and the tickets were shewn at the entrance and retained by the holders.

A Mr. Ralph Gifford (a member of the committee for the dance and al fresco concert) announced in the field in the presence of the respondent Cornelius and other members of the committee that a bicycle would be given to the person who held a ticket bearing a certain number which had been drawn by a Mrs. Townsend and that Mr. Townsend would shortly announce the winning number, and Mr. Townsend soon after announced the winning number to be 218.

Ethel Tarling had left the field before the number was announced, but afterwards returned and went to the members of the committee who were then in the field and produced the ticket numbered 218, and she was informed by Mr. Townsend that she had won a bicycle, and he told her she was a lucky lady as the bicycle was worth eight guineas and she had got it for 6*d.*

The respondent Cornelius was on August 17, 1911, warned by the police that in the opinion of the appellant if the proposal announced in the bill and advertisement were carried out it would constitute a lottery and a prosecution would probably follow. The respondent Cornelius stated that the bicycle was being given away by the Rudge-Whitworth Cycle Company through Messrs. Press & Co., their agents at Chard.

Ethel Tarling at the request of members of the committee took the ticket numbered 218 to Messrs. Press & Co. at Chard and a Rudge-Whitworth bicycle was subsequently sent by the Rudge-Whitworth Cycle Company to her address at Cheltenham.

It was contended by the solicitor for the respondents (without calling any evidence on their behalf) that no offence had been committed by them, as it was admitted that the bicycle was given by the Rudge-Whitworth Cycle Company and Messrs. Press & Co. as an advertisement and had not been purchased with any of the money contributed by those persons who purchased tickets. The justices dismissed all the informations, as they were of opinion that the appellant had failed to prove that what had taken place was a lottery, and were also of opinion that no portion

of the money paid by the purchasers of tickets went towards the purchase of the bicycle, but that the bicycle was bona fide given by the Rudge-Whitworth Company.

The question for the opinion of the Court was whether the justices upon the above statement of facts came to a correct determination in point of law.

Simey, for the appellant. The respondents Parker and Elswood were guilty of selling tickets in a lottery contrary to s. 41 of the Lotteries Act, 1823, and the respondent Young of publishing a proposal or scheme for the sale of tickets in the lottery contrary to the section. Although the bicycle was given by a third party the chance of winning it as a prize was paid for by each purchaser of a ticket. The only question is whether the persons buying the tickets were purchasing a chance: *Hall* v. *MacWilliam* (1); *Willis* v. *Young and Stembridge*. (2) The fact that the prize was given by a third person is immaterial. The essence of a lottery consists in the inducement held out to the public by the chance of obtaining a great deal more for their money than they have in truth paid for. The object of the Legislature was to protect the purchaser, and not merely to penalize the proprietors of lotteries. The chance of obtaining the prize was held out by the promoters of the dance with the object of inducing as many persons as possible to enter the field. If payment is made for a chance there is a lottery: *Morris* v. *Blackman* (3); *Taylor* v. *Smetten*. (4) As to the respondent Cornelius, it must be admitted that the information does not sufficiently allege that the field was his place so as to constitute an offence under s. 2 of the Gaming Act, 1802. (5)

The respondents did not appear.

(1) (1901) 65 J. P. 742.

(2) [1907] 1 K. B. 448.

(3) (1864) 2 H. & C. 912.

(4) (1883) 11 Q. B. D. 207.

(5) Gaming Act, 1802 (42 Geo. 3, c. 119), s. 2: "No person or persons whatsoever shall publicly or privately keep any office or place to exercise, keep open, show, or expose to be played, drawn, or thrown at or in, either by dice, lots, cards, balls, or by numbers or figures, or by any other way, contrivance, or device whatsoever, any game or lottery called a *Little Goe*, or any other lottery whatsoever not authorised by Parliament; . . . . and every person so offending shall be deemed a rogue and vagabond . . . . and shall be punishable as such rogue and vagabond accordingly."

Lotteries Act, 1823 (4 Geo. 4,

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RIDLEY J. In this case the question which we have to decide is whether the justices acted properly in dismissing the informations laid against the respondents Parsons, Elswood, and Young under the Lotteries Act, 1823. Parsons and Elswood were charged under s. 41 of the Lotteries Act, 1823, with having sold tickets or chances in a lottery, and Young was charged with having published a scheme for the sale of tickets in a lottery. The facts appear to be that certain tickets were sold by Parsons and Elswood, and an advertisement was published by Young relating to a raffle or presentation of a bicycle which had been furnished to the fête committee as a prize for the person who should win the lottery which was to be held in connection with a dance and al fresco concert at Chard on August 19, 1911. After the tickets had been sold they were drawn at a meeting of the committee in the field where the dance took place and the winner was declared. In these circumstances informations were laid against the respondents, but the justices held that they must be dismissed, the point having been taken on behalf of the respondents that the bicycle, which had been given by the Rudge-Whitworth Cycle Company as an advertisement, had not been purchased with any of the money subscribed by the persons who purchased tickets for the dance.

This case therefore raises the question whether it is an offence under s. 41 of the Lotteries Act, 1823, to sell tickets in a lottery each of which gives the purchaser a chance of winning a prize, notwithstanding that the prize which is going to the purchaser of the winning ticket has been presented, and is not

c. 60), s. 41, provides that if any person shall sell any ticket or tickets, chance or chances in any lottery or lotteries (other than those authorized by Parliament), or shall publish any proposal or scheme for the sale of any ticket or tickets, chance or chances, share or shares of any ticket or tickets, chance or chances, such person shall forfeit and pay the sum of fifty pounds, and shall also be deemed a rogue and vagabond.

By the Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 1, all provisions theretofore made relative to rogues and vagabonds were repealed, but s. 21 provides that "wherever by any Act or Acts of Parliament now in force it is directed that any person shall be punished . . . . as a rogue and vagabond . . . . for any offence specified in such Act or Acts, and not hereinbefore provided for by this Act, in every such case, whether such person shall or shall not have committed any offence against this Act, every such person shall be punished under the provisions, powers, and directions of this Act."

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to be purchased with the money subscribed. In my opinion that is not material to the offence. The Act of 1823 says that "if any person or persons shall sell any ticket or tickets, chance or chances . . . . in any lottery" he shall be guilty of an offence. I am unable to see how the fact that no part of the money which was paid for tickets went for the purchase of the prize, which was presented by the Rudge-Whitworth Cycle Company, makes any difference. I think a lottery is held whenever there is a sale of tickets which gives the holders of them the chance of winning a prize. It is selling a chance where one ticket, by chance, entitles the holder to a prize. It seems to me, therefore, that both Parsons and Elswood were guilty of the offence under s. 41 of the Lotteries Act, 1823, of selling tickets in a lottery, and that Young was guilty under the same section of the offence of publishing a proposal with regard to the sale of tickets in a lottery. The appeal must therefore be allowed and the case remitted to the justices with directions to convict these three respondents.

A. T. LAWRENCE J. I have come to the same conclusion, although I have felt some doubt with regard to the matter because the facts do not seem to me to come quite up to the level of the mischief aimed at by the Lotteries Act, 1823, but that is not a sufficient answer if the words of the statute are wide enough to cover this case, which I think they are. This was a lottery determined by chance. The destination of the prize—the winner of it—was determined by chance, and the winner obtained the prize by purchasing a ticket with a particular number upon it. I cannot see sufficient grounds for differing from the rest of the Court in thinking that all the elements of the offence created by the statute were present in this case.

PICKFORD J. I agree.

Appeal allowed. Case remitted to the justices with directions to convict the respondents Parsons, Elswood, and Young.

Solicitors for appellant: *Young & Co., for F. W. Bishop, Bridgwater.*

J. E. A.

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April 25.

LONDON COUNTY COUNCIL *v.* JONES.

London—Buildings—Dangerous Structures—Power of London County Council to shore up—Ruinous and Neglected Structures—Liability of Owner—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 106; *s.* 107, *sub-s.* 1; *s.* 115, *sub-s.* 1.

The fact that the London County Council has in pursuance of the power given to it by s. 106 of the London Building Act, 1894, temporarily shored up a structure certified by the district surveyor to be in a dangerous state does not prevent the structure from still being in a dangerous state within the meaning of that section, s. 103, and s. 107, sub-s. 1, of the Act; and the owner still remains liable, in proceedings taken against him under those sections in a petty sessional court, to an order to take down, repair, or otherwise secure to the satisfaction of the district surveyor the structure or such part thereof as appears to the Court to be in a dangerous state.

An order made by a petty sessional court under s. 115 of the Act of 1894, in respect of a ruinous and neglected structure, requiring the owner to carry out specified work upon the structure is no bar to subsequent proceedings in the petty sessional court under s. 107, sub-s. 1, of the Act against the owner of the structure for non-compliance with a notice to take down, secure, or repair the same served on him under s. 106 of the Act.

In order that a house may be dangerous within the meaning of s. 103, s. 106, and s. 107, sub-s. 1, of the Act it is not necessary that it should be dangerous to inmates or to the public passing along the adjacent highway. It is sufficient if there is an apprehension of danger or injury to adjoining houses or to their inhabitants, or even to trespassers.

Case stated by a metropolitan magistrate.

On October 11, 1911, two summonses issued on the complaint of the appellants, the London County Council, directed to the respondents, Matthew Jones and John L. Jones (trading as Matthew Jones & Co.), as owners of Nos. 5 and 54, Queensland Road, Islington, in the county of London, were heard by the magistrate sitting at the North London Police Court.

The summonses were issued under the provisions of the London Building Act, 1894, Part IX. (1), relating to dangerous and

(1) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), Part IX., s. 103:—"(1.) Where it is made known to the council that any structure is in a dangerous state the council shall require a survey of such

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neglected structures, and were each in a similar form. The first summons (omitting immaterial portions) was as follows:—

"To the owner of the structure known as 52, Queensland Road, Islington. Whereas the London County Council having had it made known to them that the said structure was in a dangerous state duly required a survey to be made of the same by the district surveyor who certified to the said council his opinion that the same was in a dangerous state and the said council thereupon in pursuance of section 106 of the London Building Act 1894 caused a notice to be served upon" the respondents "requiring" them "to take down or secure the building especially the front and back corners where the brickwork has been torn away also the centre of the building where the partition has been removed and to take down the whole of the defective ceilings throughout the house and" the respondents "having failed to

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structure to be made by the district surveyor or by some other competent surveyor."

Sect. 105: "Upon completion of his survey the district surveyor employed shall certify to the council his opinion as to the state of the structure."

Sect. 106: "If the certificate is to the effect that the structure . . . . is in a dangerous state the council may cause the same to be shored up or otherwise secured and a proper hoard or fence to be put up for the protection of passengers and shall cause notice to be served on the owner or occupier of the structure requiring him forthwith to take down secure or repair the same as the case requires."

Sect. 107: "(1.) If the owner or occupier on whom the notice is served fail to comply as speedily as the nature of the case permits with the notice a petty sessional court on complaint by the council may order the owner to take down repair or otherwise secure to the satisfaction of the district surveyor the structure or such part thereof as appears to the court to be in a dangerous state within a time to be fixed by the order . . . .

"Provided that if the owner of the structure dispute the necessity of any of the requisitions comprised in the notice he may by notice in writing to the council within seven days from the service of the notice upon himself require that the subject shall be referred to arbitration."

Sect. 115: "(1.) Where a structure is ruinous or so far dilapidated as thereby to have become and to be unfit for use or occupation . . . . a petty sessional court on complaint by the council may order the owner to take down or repair or rebuild such structure (in this Act referred to as a neglected structure) or any part thereof . . . . within a reasonable time to be fixed by the order and may also make an order for the costs incurred up to the time of the hearing."

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comply with such notice as speedily as the nature of the case permitted are therefore summoned" &c.

The other summons referred to No. 54, Queensland Road, and the work specified in the corresponding notice served in respect of that house was "to take down or secure the defective brickwork of the back wall."

At the hearing before the magistrate the respondents admitted that they were in law the owners of Nos. 52 and 54, Queensland Road, Islington, and that they had received a notice dated September 2, 1911, in respect of the house No. 52 from the appellants in the same terms as those contained in the body of the summons. A similar notice, dated September 2, 1911, in respect of No. 54, Queensland Road was admitted by the respondents to have been received by them whereby after similar recitals they were required "forthwith to take down or secure the defective brickwork of the back wall and also to shore up the said structure immediately."

It was further admitted that the district surveyor had signed in accordance with ss. 103 and 105 of the London Building Act, 1894, two certificates dated September 1, 1911, by which he certified to the appellants that each of the structures was in a dangerous condition, that it was necessary that each of them should be shored up or otherwise secured, and that as to No. 52, Queensland Road a proper hoarding or fence should be put up for the protection of passengers; and he further certified that the work necessary to be done on each of the premises was the work respectively specified in the summonses and notices hereinbefore mentioned, and that the shoring work should be done forthwith, and that a reasonable time for the execution of the specified works was in each case fourteen days; and it was admitted that the district surveyor after the expiration of the period of fourteen days again surveyed each of the premises and found that none of the works specified had been carried out by the respondents, and that workmen employed by the appellants, acting under s. 106 of the London Building Act, 1894, had temporarily shored up each of the buildings.

No notice requiring arbitration as to the necessity of any of the specified works was given under s. 107 of the Act of 1894 by the respondents.

Previously to the present proceedings the appellants had taken action and had given notice on December 5, 1910, under s. 115, dealing with ruinous and neglected structures, to the respondents, and the respondents had carried out certain work to the satisfaction of the appellants thereunder.

It was further admitted or proved that the premises were not at the moment dangerous, for the reason that they had been temporarily shored up by the appellants as above mentioned, and that even before they were so shored up there was no danger to any person in them, as they were uninhabited, nor to the public, as there was a garden space between the houses and the public pavement enclosed by railings somewhat broken down, but that if the shoring was removed each of the two buildings would probably collapse and might be then dangerous to persons unlawfully trespassing upon them.

It was submitted to the magistrate on behalf of the appellants that it was immaterial for the purposes of the proceedings whether the premises were empty or inhabited, or whether, if they were structures in a dangerous and ruinous condition, they stood back from the public street or not, and that the temporary shoring or securing of the premises by the appellants did not render the buildings any the less "dangerous structures" within the meaning of Part IX. of the London Building Act, 1894, and that it was not necessary for that purpose to shew danger as likely to happen to any person or persons.

The magistrate found as a fact that the premises were not dangerous to any person, except perhaps to trespassers, in a certain event, and was of opinion that they were not dangerous within the meaning of s. 103 of Part IX. of the London Building Act, 1894, but he was of opinion that they were ruinous within the meaning of s. 115, which involves a different procedure from ss. 103 and 105, and dismissed the summonses.

The question for the opinion of the Court was whether the magistrate came to a correct determination in point of law.

Bodkin, for the appellants. The magistrate was wrong in thinking that the fact that the premises were temporarily shored up by the appellants under s. 106 of the London Building

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Act, 1894, prevented the premises still being dangerous within the meaning of ss. 102, 103, and 107 of the London Building Act, 1894. The power to shore up only arises if the premises are in a dangerous state.

A ruinous structure may or may not be dangerous. The fact that there is no power to shore up a ruinous structure under s. 115 shews that ruinous means a condition something short of dangerous. The fact that the structure was dealt with under s. 115 does not prevent proceedings being taken under s. 103, as the procedure under s. 115 is quite distinct from that under s. 103.

The word "dangerous" would be satisfied if the premises might in falling down injure drains, gas pipes, or adjoining houses. It is not necessary that they should be dangerous to the inmates or to the public passing along the highway: *London County Council* v. *Herring*. (1) It is sufficient if there is an apprehension of danger to persons or property even though the persons may be trespassers. The only evidence before the magistrate was that of the district surveyor and his certificate. [Sects. 105, 106, and 109 of the London Building Act, 1894, were also referred to.]

The respondents did not appear.

LORD ALVERSTONE C.J. In this case the magistrate declined upon two grounds to make an order upon two informations under the London Building Act, 1894, one ground being that at the time the summonses were taken out the immediate danger was not existing because the premises had been shored up by the appellants, and the other because there had been some proceedings taken by the appellants under s. 115 of the London Building Act, 1894, with regard to the same buildings as ruinous and neglected structures. In my judgment neither of those grounds was sufficient to enable the magistrate to decline to act. With regard to shoring up, it is done in pursuance of a power given to the local authority for the protection of the public to prevent the houses being temporarily a danger; but it is the dangerous condition which gives the appellants the right to shore up, and it is quite impossible to suggest that the structure must always be left in a

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condition which would be dangerous but for the fact that shoring is there. The effect of that would be to place on the appellants the obligation of continuing to shore up the structures although expense would be involved in keeping them—and for the time being making them—not dangerous.

With regard to the second point, namely, that the structures had been treated as ruinous and neglected, I can see nothing in the London Building Act, 1894, which says that ruinous and neglected structures may not also be dangerous. Of course ruinous and neglected structures may be in that condition without there being danger; but as the statute provides the machinery for the certificate of the district surveyor, and for arbitration as to the necessity of the works specified by him on demand of the owner, in my judgment the magistrate was not entitled to say that the structures were not dangerous merely because they had been temporarily shored up, or because they had been treated some time before as being in a ruinous and neglected condition.

I desire to add that I do not express any opinion as to the degree of danger which must exist in order to constitute a dangerous structure within the meaning of the statute, but as at present advised I am not prepared to indorse the view that a building may not be dangerous even though the persons who may go there may have no legal right to go upon the premises; and where there are two houses in a row, unless the surveyor is prepared to certify that they may tumble down without doing any harm on either side, I should be inclined to think that there must be danger to some property or person. Frequently in London the most substantial houses have to be shored up simply because an adjoining house is going to be carefully taken down. Therefore to hold that structures are not to be treated as dangerous because persons cannot lawfully go upon them would be to prevent the application of a very beneficial precaution for the safety of persons who may be on other property. The case must go back to the magistrate with a direction to make the order in respect of both houses.

PICKFORD J. I agree. It seems to me that the fact that the danger has been for the moment averted by the houses having

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been shored up by the appellants cannot possibly prevent their being dangerous structures. The shoring is allowed to be done, after the dangerous condition has been certified, in order, for the time, to avert immediate danger; and the fact that the shoring has averted immediate danger is not a reason for saying that the structures are not dangerous structures.

I am not at all prepared to say that every house which is likely to tumble down is necessarily dangerous, but it seems to me that where houses form part of a row it is impossible to say that the probability of their collapse does not involve an apprehension of injury either to the persons in the houses adjoining them or to the adjoining houses themselves. It therefore seems to me that from the possible collapse of these houses there is an apprehension of danger or injury, and it is no answer to that to say "But there is no danger to persons passing by in the street because there are forecourts between it and the houses," or to say that persons cannot actually go into the houses without being trespassers, and therefore there cannot be any danger to any inmates who have any right to be there. I agree that the appeal should be allowed and the case remitted to the magistrate.

AVORY J. I am of the same opinion. I only wish to add that having regard to the terms of s. 106 of the London Building Act, 1894, it is not now compulsory upon the appellants to shore up premises which have been certified to be dangerous. In s. 72 of the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), which contained a similar provision, the word "shall" was used. The word "may" has been substituted in the London Building Act, 1894. Therefore it is impossible to hold that, if the London County Council in the exercise of their discretion decide that they will shore up the premises, they cease to be dangerous premises. In my view the magistrate has misdirected himself in law, otherwise there might be a difficulty in his finding of fact in the case stated by him that the premises were not dangerous to any persons, except, perhaps, to trespassers. But it is obvious that he has misdirected himself in law in finding that fact because he has apparently contemplated that they must be dangerous either to the public passing along the highway or to the inhabitants;

and he relies upon the fact that because these premises were uninhabited they cannot be dangerous to the inhabitants and because they do not actually abut on the highway they cannot be dangerous to the public. It is to be observed that if premises are dangerous to the inmates there is a special provision in s. 114 of the London Building Act, 1894, dealing with that case. Therefore under s. 103 it need not be shewn that they are dangerous to the inmates, and in my opinion it need not be shewn that they are dangerous to the public using the highway.

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Case remitted.

Solicitor for appellants: *E. Tanner.*

J. E. A.

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Motor Car—User at Night without Lamp kept burning so as to illuminate Identification Plate—Offence under Motor Car Act, 1903—*Motor Car (Registration and Licensing) Order*, 1903, *art. XI.—Defence open to Defendant—Motor Car Act*, 1903 (3 *Edw.* 7, *c.* 36), *s.* 2, *sub-s.* 4.

The appellant was charged under art. XI. of the Motor Car (Registration and Licensing) Order, 1903, with using a motor cycle at night on a public highway without having a lamp burning on the cycle so contrived as to illuminate every letter or figure on the cycle as required by the article :—

Held, that the offence with which the appellant was charged was an offence under s. 2, sub-s. 4, of the Motor Car Act, 1903, and that it was open to him under the sub-section to set up the defence that he had taken all steps reasonably practicable to prevent the letters and figures which ought to have been illuminated being obscured or rendered not easily distinguishable.

Brown v. *Crossley* [1911] 1 K. B. 603, followed.

CASE stated by justices for the county of London.

A complaint was preferred by the respondent, David Sewell, against the appellant for that he the appellant on September 25, 1911, at Spaniards Road in the borough of Hampstead in the county of London, then being the driver of motor cycle L.A. 1069, at 9.30 P.M., did fail to keep a lamp burning thereon so contrived as to illuminate every letter or figure on the said

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motor cycle, contrary to the statute in such case made and provided. (1)

At the hearing of the complaint it was proved that on the day stated in the complaint and between one hour after sunset and one hour before sunrise the appellant drove a motor cycle at Spaniards Road, Hampstead, to which was attached a lamp. The lamp was not alight, and the letters and figures on the

(1) Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), s. 2: "During the period between one hour after sunset and one hour before sunrise, the person in charge of a light locomotive shall carry attached thereto a lamp so constructed and placed as to exhibit a light in accordance with the regulations to be made by the Local Government Board."

Sect. 6: "(1.) The Local Government Board may make regulations with respect to the use of light locomotives on highways, and their construction, and the conditions under which they may be used."

Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 2: "(4.) If a car is used on a public highway without being registered, or if the mark to be fixed in accordance with this Act is not so fixed, or if, being so fixed, it is in any way obscured or rendered or allowed to become not easily distinguishable, the person driving the car shall be guilty of an offence under this Act, unless, in the case of a prosecution for obscuring a mark or rendering or allowing it to become not easily distinguishable, he proves that he has taken all steps reasonably practicable to prevent the mark being obscured or rendered not easily distinguishable."

Sect. 7: "(1.) The Local Government Board may under section 6 of the Locomotives on Highways Act, 1896 (in this Act referred to as the principal Act), make regulations—

"(*a*) providing generally for facilitating the identification of motor cars, and in particular for determining and regulating the size, shape and character of the identifying marks to be fixed under this Act, and the mode in which they are to be fixed and to be rendered easily distinguishable whether by night or by day . . . ."

The Motor Car (Registration and Licensing) Order, 1903 (stated therein to have been made by the Local Government Board in pursuance of the powers given to the Board by the Locomotives on Highways Act, 1896, and the Motor Car Act, 1903, for the purpose of bringing the Act of 1903 into operation and giving effect to that Act): "Article XI.—Whenever during the period between one hour after sunset and one hour before sunrise a motor car is used on a public highway, a lamp shall be kept burning on the car, so contrived as to illuminate by means of reflection, transparency, or otherwise, and render easily distinguishable every letter or figure on the identification plate fixed on the back of the motor car or of any vehicle attached to the back of the motor car, as the case may be."

identification plate affixed to the motor cycle were not illuminated as required by art. XI. of the Motor Car (Registration and Licensing) Order, 1903.

The appellant did not dispute the fact that the lamp on the motor cycle was out when he was stopped by the police, but proposed to avail himself of the defence provided by s. 2, sub-s. 4, of the Motor Car Act, 1903, and to prove that he had taken all steps reasonably practicable to prevent the letters and figures on the motor cycle which ought to have been illuminated by the lamp affixed thereto from being obscured or rendered not easily distinguishable.

The justices were of opinion that the defence provided by s. 2, sub-s. 4, of the Motor Car Act, 1903, did not apply to the complaint, and so decided.

The appellant having heard the decision of the justices did not call any evidence, and they accordingly convicted him.

The question for the opinion of the Court was whether the justices came to a correct decision in point of law.

G. F. Mortimer, for the appellant. Art. XI. of the Motor Car (Registration and Licensing) Order, 1903, under which the appellant was summoned, is merely an expansion of s. 2, sub-s. 4, of the Motor Car Act, 1903, and the justices were wrong in holding that the defence provided for by the sub-section, namely, that the appellant had taken all steps reasonably practicable to prevent the letters and figures on the identification plate being obscured, was not open to him. Art. XI. merely contains a concrete example of the manner in which a mark may be rendered not easily distinguishable within the meaning of s. 2, sub-s. 4, of the Act of 1903 by the lamp being allowed to go out: *Brown* v. *Crossley*. (1) Therefore the same defence can be set up to a summons taken out under art. XI. as that which can be relied upon if the summons issues under s. 2, sub-s. 4, of the Act of 1903.

Bodkin, for the respondent. The justices were right. Sect. 2, sub-s. 4, of the Motor Car Act, 1903, deals with the physical condition of the mark itself, which must not be obscured or

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allowed to become not readily distinguishable as a mark. The sub-section deals with a different matter to that to which art. XI. of the Motor Car (Registration and Licensing) Order, 1903, relates. Art. XI. imposes the duty of keeping a lamp burning on a car. It deals with the character of the lamp. Sect. 2, sub-s. 4, of the Act of 1903 prohibits the mark itself—as a mark—from being allowed to become not easily distinguishable. If a lamp were kept burning according to art. XI., but the mark on the car was dirty and therefore obscured, the driver would be guilty of an offence under s. 2, sub-s. 4, of the Act of 1903. *Brown* v. *Crossley* (1) is distinguishable. The question in that case was whether the offence of which the respondent had been convicted was an offence which was the subject of indorsement upon his licence. A positive duty is imposed by art. XI., namely, to keep the lamp alight, and another positive duty is imposed by s. 2, sub-s. 4, of the Act of 1903, namely, to keep the mark unobscured. But in the latter case the defence mentioned in the sub-section is open to the defendant. If the lamp goes out, the defendant, whatever the condition of the mark may be, commits an offence under art. XI., not under s. 2, sub-s. 4, of the Act of 1903. The power of a Court of summary jurisdiction to dismiss a summons is ample without recourse to the defence provided by s. 2, sub-s. 4, of the Act of 1903. For instance, if the lamp were hot the Court could dismiss the summons on the ground that no substantial offence had been committed. All the words contained in s. 2, sub-s. 4, of the Motor Car Act, 1903, point to some act or omission on the part of the driver. The word "obscured" is used in the active sense and applies to a case where a person does something which obscures the mark, e.g., puts his coat over it or over the lamp, or dust gradually obscures the mark. It would not apply to the case of darkness setting in so that it became too dark to see the mark.

The regulations contained in the Motor Car (Registration and Licensing Order), 1903, of which art. XI., under which the defendant was summoned, is one, were made under the Locomotives on Highways Act, 1896, and the Motor Car Act, 1903. [Sect. 7 of the Locomotives on Highways Act, 1896; s. 7 of the

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Motor Car Act, 1903; and arts. IV. and VIII. of the Motor Car (Registration and Licensing Order), 1903, were also referred to.]

Mortimer in reply. If the defence under s. 2, sub-s. 4, is not available, it follows that a conviction must follow whatever may be the circumstances in which the light is not kept burning so as to comply with art. XI., and *Brown* v. *Crossley* (1) shews that the conviction would have to be indorsed upon the licence. This could not have been the intention of the Legislature.

LORD ALVERSTONE C.J. I am of opinion that this appeal must be allowed. The point we have to determine is by no means free from difficulty, but for the reasons I am about to give I have come to the conclusion that the offence with which the appellant was charged was an offence under s. 2, sub-s. 4, of the Motor Car Act, 1903, and that the view that the Court—and particularly my brother Avory—took in *Brown* v. *Crossley* (1), that art. XI. of the Motor Car (Registration and Licensing) Order, 1903, is an expansion or definition of the duty imposed by s. 2, sub-s. 4, of the Act of 1903, is correct.

The article does not merely provide for keeping a lamp alight. The tail or red light—quite apart from any question of its illuminating the identification plate—is governed by regulations other than art. XI. of the Motor Car (Registration and Licensing) Order, 1903. There might be at times upon the car a tail light shewing red behind and white in front, and also the lamp to illuminate the identification plate. Sect. 2 of the Locomotives on Highways Act, 1896, provides that a light locomotive shall between one hour after sunset and one hour before sunrise carry a lamp in accordance with regulations to be made by the Local Government Board, and the regulation which governs that matter is art. II., clause 7, sub-clause 1, of the Motor Cars (Use and Construction) Order, 1904, which provides that "the lamp to be carried attached to the motor car in pursuance of section 2 of the Act of 1896 shall be so constructed and placed as to exhibit, during the period between one hour after sunset and one hour before sunrise, a white light visible within a reasonable distance in the direction towards which the

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motor car is proceeding or is intended to proceed, and to exhibit a red light so visible in the reverse direction." It might therefore be that there was an illuminating light which satisfied art. XI. of the Motor Car (Registration and Licensing) Order, 1903, and yet was not in accordance with art. II. of the Motor Cars (Use and Construction) Order, 1904. Therefore the obligation to carry a lamp behind depends upon something other than art. XI. of the Motor Car (Registration and Licensing) Order, 1903. Sect. 7 of the Locomotives on Highways Act, 1896, provides that "A breach of any byelaw or regulation made under this Act, or of any provision of this Act, may, on summary conviction, be punished by a fine not exceeding ten pounds." The Motor Car Act, 1903, again dealt with the identification plate, and in s. 2, sub-ss. 1 and 2, provision is made for the registration of the motor car and the fixing of a mark indicating the registered number to be borne on the car "in such manner as the council require in conformity with regulations of the Local Government Board made under this Act." Regulations have been made under that Act, and arts. VII. and VIII. of Part I. of those regulations (of which art. XI. is one) relate to the registration of and marks to be fixed to motor cars referred to in s. 2, sub-ss. 1 and 2, of the Motor Car Act, 1903. The further provision is contained in s. 2, sub-s. 4, of the Act of 1903, quite independently of the question of lights, that if the car is used without being registered, i.e., as required by sub-s. 1 of s. 2, or if the mark to be fixed (as required by sub-s. 2 of s. 2) is not so fixed, "or if, being so fixed, it is in any way obscured or rendered or allowed to become not easily distinguishable, the person driving the car shall be guilty of an offence under this Act."

Speaking for myself, I do not think a person could be summoned under s. 2 of the Act of 1903 simply because, although he had a perfectly proper identification plate, darkness prevented the mark from being visible. I agree that the prima facie scope and object of the section is to deal with what I may call the physical condition of the plate. A regulation under sub-s. 2 of s. 2 of the Act of 1903 might have dealt with the question of lights, but even apart from that s. 7 of the Act of 1903 shews

that the framers of the Act thought that the mere obligation to carry a lamp under the Locomotives on Highways Act, 1896, might be required to be supplemented by some regulations which had a bearing upon the visibility of the identification plate, and therefore art. XI. was framed. It is quite possible that there might be light enough to see a car and that it would therefore be unfair to summon a person simply because he had not a tail light, it being practically daylight, and yet there might not be light enough to enable the actual number on the identification plate to be distinguished without a proper lamp illuminating it. The appellant was summoned for failing "to keep a lamp burning thereon so contrived as to illuminate every letter or figure on the said motor cycle." The summons must therefore be taken as a summons for not observing art. XI. In those circumstances it seems to me that it is a summons for an offence under sub-s. 4 of s. 2 as explained, defined, and described by art. XI., and accordingly, if a car were used without the lamp being kept burning, the defendant ought to be allowed to prove "that he has taken all steps reasonably practicable to prevent the mark being obscured or rendered not easily distinguishable." At night something more than an unobliterated identification plate is required. Even if it be unobliterated some provision that it shall be visible at night is required. In my opinion the view which we took in *Brown* v. *Crossley* (1) was correct, and further consideration of the arguments which have been addressed to us in the present case have led me to the conclusion that the appellant was summoned for a breach of sub-s. 4 of s. 2, and that, therefore, the justices ought to have allowed him to give the evidence which was open to him under that section. This appeal must therefore be allowed with costs, and the case will go back to the justices to hear and determine upon the merits.

PICKFORD J. I agree that this appeal should be allowed. In my judgment this case is governed by the decision in *Brown* v. *Crossley*. (1) In that case the respondent had been convicted for a breach of art. XI. and he was called upon to produce his licence for indorsement. Whether the licence could be indorsed

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or not depended upon two things. If the offence of which he had been convicted was an offence in connection with the driving of a motor car, he could be called upon to produce his licence for indorsement; but he could be also called upon to produce it for indorsement if the offence of which he had been convicted was an offence against the Motor Car Act, 1903; and the two questions left for the opinion of the Court were: (1.) "Was the offence the subject of the conviction of April 30, 1910, before referred to, an offence against the Motor Car Act, 1903?" (2.) "Alternatively, was the said offence an offence in connection with the driving of a motor car?" There were, therefore, two points before the Court. No doubt the decision of either one of them would have made a decision of the other unnecessary, but it did not make a decision upon the point obiter. The Court decided upon both grounds. They decided that it was an offence in connection with the driving of a motor car, which is immaterial to this case; but they also decided that the offence was an offence against the Motor Car Act, 1903. I do not propose to go through the judgments, but the effect of them to my mind is clearly this: the regulation contained in art. XI. was made for the purpose of (I do not propose to use any such expression as "amplifying" or "amplification") carrying out the provisions of s. 2, sub-s. 4, of the Motor Car Act, 1903, and it deals with what is in fact merely one particular instance of a breach of the general duty which was imposed by s. 2, sub-s. 4, of the statute. In my judgment that was the decision in *Brown* v. *Crossley* (1); and, if so, it obviously follows that there must be open to a person accused of a particular breach of the general duty imposed by sub-s. 4 of s. 2 the defence which is by the language of the sub-section open to any person accused of any breach of it. That decision seems to me clearly to cover the present case, and therefore I agree that the appeal should be allowed.

I desire to add that I do not wish to express any opinion that in the absence of art. XI. the appellant could not have been convicted on the principles of the judgment in *Brown* v. *Crossley* (1) under s. 2, sub-s. 4, itself. I agree the appeal should be allowed.

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AVORY J. In *Brown* v. *Crossley* (1) my Lord and my brother Hamilton decided that a person committing a breach of art. XI. of the Motor Car (Registration and Licensing) Order, 1903, was guilty of an offence under the Motor Car Act, 1903, and was, therefore, liable to have his licence indorsed under s. 4 of that statute. I did not dissent from that view, but preferred to base my judgment on the ground that the breach was an offence in connection with the driving of a motor car. I am now satisfied, on further consideration, that such a breach is also an offence under the Motor Car Act, 1903. It is an offence within the meaning of sub-s. 4 of s. 2 of the Act of 1903 as amplified (I do not myself see any objection to that expression) by the Motor Car (Registration and Licensing) Order, 1903, and the defence provided by sub-s. 4 of s. 2 of the statute is available to any person charged with a breach of art. XI. Sect. 7 of the Act of 1903 provides that the Local Government Board may make regulations "providing generally for facilitating the identification of motor cars and in particular" for the mode in which the identification marks are to be "rendered easily distinguishable whether by night or by day"; that is to say regulations for the particular matters which are referred to in s. 2 (including sub-s. 4) of the statute. The whole of the provisions of s. 2 of the statute relate to the registration and identification marks on the car. The regulations contained in the Motor Car (Registration and Licensing) Order, 1903, recite s. 2, sub-s. 4, of the Motor Car Act, 1903. They subsequently state that "in pursuance of the powers given to us by the Act of 1896 and the Act of 1903 . . . . we . . . . make the following regulations, and direct that the same shall have effect"—for what purpose?—"for the purpose of bringing the Act of 1903 into operation and giving effect to that Act." There is therefore an express statement, upon the face of the regulations themselves, that they are for the purpose of giving effect to the Act of 1903, including sub-s. 4 of s. 2; and art. XI. is obviously for the purpose of giving effect to so much of sub-s. 4 of s. 2 as relates to the identification mark becoming not easily distinguishable after darkness has set in. In *Brown* v. *Crossley* (1) I pointed

(1) [1911] 1 K. B. 603.

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out the difficulty in which motor car drivers placed themselves by their contention in that case that a breach of art. XI. was not an offence under the Motor Car Act, 1903. They have now seen the folly of that contention. I think that they were wrong in that contention, and that they are right in their present contention that the defence provided by sub-s. 4 of s. 2 of the Motor Car Act, 1903, is open to them when they are charged with a breach of art. XI. of the regulations made under the sub-section.

Appeal allowed.

Solicitor for appellant: *G. D. Dean.*

Solicitors for respondent: *Wontner & Sons.*

J. E. A.

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May 10.

MASON (TRUSTEE OF CHETWYND, A BANKRUPT) *v.* BOLTONS LIBRARY, LIMITED.

Bankruptcy—Act of Bankruptcy—"Goods held by sheriff for twenty-one days"—Interpleader Summons—Consent Order for Sale of Goods—Calculation of Time—Title of Trustee in Bankruptcy to Proceeds of Sale—Bankruptcy Act, 1890 (53 *&* 54 *Vict. c.* 71), *s.* 1—*Rules of the Supreme Court,* 1883, *Order* LVII., *rr.* 1, 8, 11, 12.

The Bankruptcy Act, 1890, s. 1, enacts that a debtor commits an act of bankruptcy if his goods are seized in any civil proceeding in the High Court and are "held by the sheriff for twenty-one days," provided that where an interpleader summons is taken out in regard to the goods seized, the time elapsing between the date at which the summons is taken out and the date at which the sheriff is ordered to withdraw, or any interpleader issue ordered thereon is finally disposed of, shall not be taken into account in calculating such period of twenty-one days.

On May 20, 1911, the sheriff seized the goods of a debtor under a writ of fi. fa., and on June 9 (the twentieth day after the seizure) took out an interpleader summons which was heard on June 12, when, the third party claim being admitted, an order was made by consent that the sheriff should sell and pay the amount of the claim and his costs of the execution. The sheriff on the next day sold the goods. The debtor having become bankrupt, his trustee in bankruptcy claimed the proceeds of the sale on the ground that the debtor had committed an act of bankruptcy by reason of the sheriff having been in possession for twenty-one days:—

Held, that the words "any interpleader issue ordered thereon is finally disposed of" in the statute apply not only to cases where an issue is stated and is separately decided, but also to cases where on the

hearing of the summons a decision is made which finally determines the matter in dispute; and that the words "time elapsing between" mean the time elapsing between the date of the summons and the date of such decision.

Held, also, that in calculating the twenty-one days the whole of the period occupied by the interpleader proceedings, i.e., the four days from June 9 to June 12, both inclusive, and not merely the two days between those dates, ought not to be reckoned, and that therefore the act of bankruptcy was not committed.

ON May 18, 1911, the defendants, who were judgment creditors of Florence Chetwynd, a widow, for the sum of 124*l.* 17*s.* 8*d.* and costs, issued a writ of fi. fa. out of the King's Bench Division, and on May 20 the sheriff seized the goods of the judgment debtor at Durtnall's Repository, Brighton. Thereupon Maple & Co., Limited, of London, claimed a lien on the goods for 70*l.*, and on June 9 the sheriff took out the usual interpleader summons requiring all parties to attend in chambers on June 12 on the hearing of the application of the sheriff "that the plaintiffs and the claimants appear and state the nature and particulars of their respective claims to the goods and chattels seized by the above-named sheriff under the writ of fieri facias issued in this action, and maintain or relinquish the same and abide by such order as may be made herein, and that in the meantime all further proceedings be stayed."

On June 12, at the hearing of the summons, the claim of Maple & Co., Limited, was admitted, and by consent it was ordered "that the said sheriff of Sussex sell the goods seized by him under the writ of fieri facias issued herein and that no action be brought against the said sheriff for the seizure and sale of the said goods. And it is further ordered that out of the proceeds of the said sale the said sheriff do pay Messrs. Maple & Co. Limited their lien of 70*l.* in the first instance and it is further ordered that the costs of the said sheriff be paid out of the proceeds of the said sale with remedy over against the execution creditors."

On June 13 the sheriff sold the goods by public auction, and, after paying his costs and the lien of Maple & Co., Limited, paid over on July 5 the sum of 109*l.* 16*s.* 10*d.*, being the balance of the proceeds of sale, to the defendants, the judgment creditors.

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In the meantime, on June 29, a bankruptcy petition was presented against Florence Chetwynd, the act of bankruptcy alleged being the aforesaid seizure and sale of her goods, and the same day notice of the petition was given to the defendants and to the sheriff. On October 23 a receiving order was made against Florence Chetwynd upon the petition, and on December 5 she was adjudicated a bankrupt and Mr. Mason was appointed the trustee in bankruptcy.

In January, 1912, the trustee commenced this action against the defendants, claiming payment of the 109*l.* 16*s.* 10*d.* received by them from the sheriff on the ground that the same formed part of the bankrupt's estate by reason of the sheriff's remaining in possession of the said goods for a period of twenty-one days under the writ of fi. fa., which was an act of bankruptcy of which the defendants had notice. The defendants by their defence pleaded that the interpleader issue was finally disposed of on June 12, and that the sale was completed on June 13, and they denied that the sheriff was in possession for twenty-one days or that the debtor committed the act of bankruptcy alleged.

Clayton, K.C., and *R. J. Willis*, for the plaintiff. The seizure and sale by the sheriff was an act of bankruptcy, but that act of bankruptcy does not deprive the execution creditor of the fruits of his diligence: *Ex parte Villars.* (1) The trustee relies on the preceding act of bankruptcy committed by the sheriff holding the goods for twenty-one days: *Figg* v. *Moore Brothers* (2); *Burns-Burns* v. *Brown.* (3) The defendants rely on the proviso (4), but here the sheriff was not ordered to withdraw nor was an issue

(1) (1874) L. R. 9 Ch. 432.
(2) [1894] 2 Q. B. 690.
(3) [1895] 1 Q. B. 324.
(4) The Bankruptcy Act, 1890, s. 1, enacts: "A debtor commits an act of bankruptcy if execution against him has been levied by seizure of his goods under process in an action in any Court, or in any civil proceeding in the High Court, and the goods have either been sold or held by the sheriff for twenty-one days. "Provided that, where an interpleader summons has been taken out in regard to the goods seized, the time elapsing between the date at which such summons is taken out and the date at which the sheriff is ordered to withdraw, or any interpleader issue ordered thereon is finally disposed of, shall not be taken into account in calculating such period of twenty-one days."

directed, and therefore the time elapsing between the date of the summons and the date of the consent order is not to be deducted. The proviso must be construed strictly, and if one of the events contemplated does not happen it does not apply.

[PHILLIMORE J. You say there must be a terminus a quo and a terminus ad quem?]

Yes. Here no issue was directed to be tried, and therefore there was no terminus ad quem and no interval of time that could be taken into computation, for an interval of time cannot be reckoned if one of the termini can never exist. If the proviso does not apply, the act of bankruptcy was complete on June 10. But if it does apply, and assuming that "the date" means "the day" of the summons and order as a point of time,—*In re Railway Sleepers Supply Co.* (1)—it is only "the time elapsing between" June 9 and 12 that has not to be reckoned, i.e., two days, and deducting those two days the act of bankruptcy was complete on June 12, which was the day before the day the sheriff sold. Therefore the plaintiff is entitled to the proceeds of sale.

E. W. Hansell and *D. Hogg*, for the defendants. The proviso is for the benefit and protection of the execution creditor and should receive a liberal construction. The terminus a quo is the taking out of the summons, and the true construction is that time is not to run until the determination of the questions raised by the summons. The procedure here was in accordance with Order LVII., rr. 1, 8, 11, and 12, and the order made on the summons in substance decided the matter in dispute. The proviso does not exhaust the cases that may occur under interpleader proceedings, and is intended to include either the withdrawal of the sheriff, or the stating of an issue to be tried, or an order on the summons which finally decides the rights of the parties. Further, the object of the proviso is that all the period occupied by the interpleader proceedings is to be excluded from the twenty-one days, and *In re North* (2) decides that to constitute the act of bankruptcy the sheriff must hold for the whole of the twenty-one days, excluding the day of seizure. Here, if the four days from June 9 to 12, or even three of those days,

(1) (1885) 29 Ch. D. 204. (2) [1895] 2 Q. B. 264, 270.

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are not reckoned, the sheriff sold before the twenty-one days expired and the defendants are protected.

Clayton, K.C., in reply. An act of bankruptcy is the creature of statute, and the statute must be strictly construed. The trustee relies on the words "issue ordered thereon" in the proviso. Here no issue was ordered for trial, nor did the consent order summarily determine any issue between the parties.

PHILLIMORE J. Sect. 1 of the Bankruptcy Act, 1890, created a new act of bankruptcy, to wit, the holding by the sheriff of goods seized in execution for twenty-one days. That has been construed to mean twenty-one whole days after the day on which they were seized: *In re North.* (1) The section has this proviso in favour of the execution creditor and sheriff: "Provided that where an interpleader summons has been taken out in regard to the goods seized, the time elapsing between the date at which such summons is taken out and the date at which the sheriff is ordered to withdraw, or any interpleader issue ordered thereon is finally disposed of, shall not be taken into account in calculating such period of twenty-one days." In this case the facts are not in dispute. The sheriff seized on May 20, and there would be eleven days left in May and ten days in June which would make the twenty-one days. On June 9 an interpleader summons was issued by the sheriff because Messrs. Maple & Co., Limited, claimed a lien upon the goods for a sum of money. The summons, omitting formal parts, was in this form: "That all parties attend on Monday, the 12th of June, at 12 o'clock on the hearing of an application on the part of the sheriff of Sussex that the plaintiffs and the claimants appear and state the nature and particulars of their respective claims to the goods and chattels seized by the above named sheriff under the writ of fieri facias issued in this action, and maintain or relinquish the same and abide by such order as may be made herein." On the 12th, the day fixed for the hearing, all parties appear to have been before the Master, and this order was drawn up: "Upon hearing the solicitors for the plaintiffs, the defendant, the claimants,

(1) [1895] 2 Q. B. 264.

and the sheriff of Sussex, and by consent, it is ordered "—it is an order made therein in accordance with the terms of the summons—"that the sheriff sell the goods seized by him and that no action be brought against him"—I am omitting immaterial words—"And it is further ordered that out of the proceeds of the sale the sheriff pay Messrs. Maple & Co. Limited their lien of 70*l.* in the first instance"—the amount of the lien has now been either admitted or agreed—"and it is further ordered that the costs of the sheriff be paid out of the proceeds of the sale with remedy over against the execution creditors."

Now the first question I have to determine is, Is there in this case any "time elapsing between" within the meaning of the proviso? Counsel for the plaintiff, the trustee in bankruptcy, says there is no time elapsing between, because time elapsing between postulates a terminus a quo and a terminus ad quem, and that no terminus ad quem, such as the statute contemplates, was ever reached. I am not certain that if I gave effect to the view that there was no terminus ad quem, I should necessarily decide in favour of the plaintiff. If the time has once begun to run I am not at all sure that it must not be taken to continue to run until the end is reached, and, if there is no terminus ad quem, that it must continue to run for ever. But I do not decide the case upon that ground, because I do not think that the Legislature ever intended there should not be a terminus ad quem. The proviso contemplates two possible termini ad quem—"the date at which the sheriff is ordered to withdraw" and "any interpleader issue ordered thereon is finally disposed of." Now many things may happen upon an interpleader summons. The claimant may on better advice withdraw his claim, or he may be ordered to give security and may fail to do so and his claim would be barred, or the sheriff may be ordered to withdraw, that is, the claimant may prove his claim, or an interpleader issue may be ordered. Does the ordering of an "interpleader issue" for this purpose mean the stating of an issue, such as we are familiar with in interpleader matters, to be tried by a judge and jury, or by a judge alone, or by leave of the Master alone, or does it mean

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the determination of the matters brought to issue by the claim and persistence in the claim and persistence in the objection to the claim? Now if the sheriff is ordered to withdraw, the statute is immediately met. It is also possible, if the result is that the sheriff is not ordered to withdraw, or if the claimant withdraws and there is not any decision between the parties, and possibly if the claimant is barred, that this proviso does not apply. It may be that such trumpery claims are not regarded by the Legislature and that the creditor is not protected with respect to them. But in my opinion, if there is a decision by the Master, or whoever may be the ultimate Court, "the time elapsing" is the time elapsing between the date of the summons and the date of that decision, and the words "any interpleader issue ordered thereon is finally disposed of" are not limited to cases where the issue is stated and separately decided, but apply also to cases where the decision is in accordance with the terms of the summons which finally settles the matter. The parties are ordered to attend and abide by such order as may be made, and upon their attendance an order is made; whether it is looked upon, as it may be, as if notionally the Master ordered an interpleader issue to be tried before himself and then made the order which is here made, which is possible because such things are done in judges' chambers both by Masters and in other matters by judges, or whether it means that the matter at issue in the interpleader is finally disposed of, I really do not care very much. I am quite certain that the sense of the statute is to protect the execution creditor during the whole of the time that the matter is out of his hands and out of the hands of the sheriff and where, with the utmost diligence, neither of them can do anything. I think, therefore, that in this case the interval of time elapsing is the interval between the date of the summons and the date of the order made by the Master which did finally dispose of the matter in dispute.

Then comes a very curious question. The interpleader summons was issued on June 9, and at that time the execution creditors had that day and the next to run if there had been no interpleader summons. It is not heard until the 12th and the sale takes place on the 13th. Counsel

for the plaintiff says that the execution creditors had only two days between the 9th and the 12th, to wit, the 10th and 11th, to count, and that therefore, as they had already used up nineteen of their days, their twenty-first day was in fact reached before the order on the interpleader summons was made, the effect of which would be to deprive them of two of their days and to make it in substance that they had only nineteen days instead of twenty-one in which to sell. If either the 9th or the 12th counted, so that they would have three days' interval, then their sale which took place on the 13th (and it is agreed it was completed on that day) would be in time. I think, however, that, logically, it is either two days or four days. I do not think three days can be supported, though I have in that connection considered s. 141 of the Bankruptcy Act of 1883. But I have come to the conclusion that the bold argument for the defendants is the right one and that the execution creditors are entitled to both the 9th and the 12th. Otherwise it seems to me that through no fault of their own they do not get their twenty-one days. One must consider the words of the proviso very carefully. It is not "between the days," it is "the time elapsing between" the dates. I agree one cannot divide the days, and if one cannot divide the days, and if, as Lord Esher said in *In re North* (1), one ought to give as much benefit as one can to the creditor who is being for the first time deprived of certain rights by the statute, one ought to consider that the day begins at the very first moment and ends at the very last. I think, therefore, treating the day as a whole, that the time elapses from the moment of the beginning of the day on which the summons is taken out until the end of the day on which the order is made, and that, unless the execution creditors could have effected the sale on June 9 before the summons was served upon them on that day, or effected the sale on June 12 after the order had been made on that day, it seems to me common sense that they ought to have those two days quite as much free from counting against them as the two days in between, and that the right thing here is to hold that both days inclusive are part of the time elapsing between the dates.

(1) [1895] 2 Q. B. 264, 270.

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I therefore give judgment for the defendant company with costs.

Solicitor for plaintiff: *Geo. Castle.*
Solicitors for defendants: *Tackley & Fall.*

H. L. F.

1912

May 17.

ROSIN *v.* JOSEPH RANK, LIMITED.

Practice—County Court—Hearing before Registrar—Mistake of Law—Power of County Court Judge to order a New Trial—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *ss.* 92, 93.

Where the registrar of a county court has, in the exercise of the jurisdiction given by s. 92 of the County Courts Act, 1888, heard and determined a disputed claim, the county court judge has power under s. 93 to order a new trial if the registrar's decision was wrong in law.

APPEAL from the City of London Court.

The defendants were a firm of millers, and the plaintiff, a baker, had for some years purchased his flour from them. Previously to August, 1911, he bought the flour on the terms of a month's credit. On August 15, 1911, he bought from them 600 sacks of flour under a contract note which contained the terms "Cash before delivery if required" and "If delivery by instalments each instalment to be considered a separate contract." The plaintiff arranged to take delivery of the flour by instalments, and for the instalments delivered between the date of the contract and November 13 the defendants allowed the plaintiff the usual credit. On November 13 the plaintiff sent his wagon for a further instalment, but the defendants, who had not given the plaintiff notice of intention to alter their practice, refused to deliver it without payment in cash, and the wagon had to return empty. The action was brought to recover the sum of 25*s.* for the cost of the abortive journey of the wagon and the loss of the profit that the plaintiff would have made on a resale of the flour if it had been delivered. The parties appeared before the registrar, who heard the case (1)

(1) By the County Courts Act, 1888, s. 92, "Subject to rules and orders under this Act a registrar may on the application of the parties

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and gave judgment for the plaintiff for the amount claimed. The registrar gave the defendants leave to appeal to the deputy county court judge, but he did not give any leave to appeal direct to the High Court under s. 120 of the County Courts Act, 1888, nor was any such leave asked for. The defendants accordingly appealed to the deputy county court judge for an order for a new trial on the ground that the registrar in his construction of the contract was wrong in law. The deputy judge refused to hear the application for a new trial on the ground that he had no jurisdiction to do so, there being no appeal from the registrar to the judge given by the County Courts Act. He, however, gave leave to appeal from his refusal to hear the application and also from the registrar's judgment. The defendants appealed from both decisions.

Cautley, for the defendants. The deputy judge was wrong in declining jurisdiction. Sect. 93 of the County Courts Act gives the judge express power "in every case whatever" to order a new trial if he thinks it just. One of the grounds on which a new trial may be granted is misdirection, and here the registrar in putting a wrong construction on the contract misdirected himself. Secondly, there is a right of appeal direct to this Court under s. 120 from any "determination or direction of the judge in point of law," provided, in cases where the damage claimed does not exceed 20*l.*, "the judge . . . . shall grant leave to appeal." The "judge" whose determination

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and by leave of the judge hear and determine any disputed claim where the sum claimed or amount involved does not exceed two pounds."

Sect. 93: "Every judgment and order of the Court, except as in this Act provided, shall be final and conclusive between the parties. . . . . The judge shall also in every case whatever have the power, if he shall think just, to order a new trial to be had upon such terms as he shall think reasonable."

Sect. 120: "If any party in any action or matter shall be dissatisfied with the determination or direction of the judge in point of law . . . . the party aggrieved by the judgment, direction, decision, or order of the judge may appeal from the same to the High Court . . . . Provided always that there shall be no appeal in any action of contract . . . . where the debt or damage claimed does not exceed twenty pounds . . . . unless the judge shall think it reasonable and proper that such appeal should be allowed, and shall grant leave to appeal."

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may be so appealed from includes the registrar when sitting to hear actions under s. 92, for in so sitting he sits as the judge. It is true that here the registrar did not give leave to appeal to the High Court, but such leave was given by the deputy judge, and that was sufficient to satisfy the condition of s. 120.

Graham Mould, for the plaintiff. The deputy judge had no power to entertain the application for a new trial. The words "in every case" in s. 93 must mean in every case which is properly before the judge, but a plaint which has been heard by the registrar under s. 92 cannot be properly before the judge unless there is a right of appeal given by the Act from the registrar to the judge. In the absence of such a right of appeal any application to the judge is coram non judice. Sect. 93 provides that "every judgment and order of the Court,"—which expression by s. 186 includes the registrar of the Court—"except as in this Act provided, shall be final and conclusive between the parties"; and the Act gives no right of appeal to the judge except in interlocutory matters. But even if the registrar when sitting for the judge is to be treated as being the judge, still there was no power to order a new trial in this case, for a mistake in law is a ground for a new trial only where the case was tried before a jury. A judge cannot order a new trial on the ground that he misdirected himself. Where he does so misdirect himself, the only remedy, if any, is appeal. With regard to the appeal direct from the registrar to this Court, it is clear that the conditions of s. 120 were not complied with. The "judge" whose leave to appeal is thereby required must be the "judge" whose determination in point of law is complained of. The word cannot be used in the same section to refer to two different persons. And here the registrar gave no leave to appeal to this Court.

RIDLEY J. This case must go back to the deputy county court judge to hear the application for a new trial. The amount claimed being under 2*l.*, the case came on for hearing before the registrar. The registrar heard the case and gave judgment for the plaintiff for the amount claimed. Then there was an application to the deputy judge for a new trial upon the ground that the registrar had made a mistake of law in his construction of the

contract which formed the subject-matter of the action. The deputy judge held that he had no jurisdiction to entertain the application and he accordingly dismissed it. However he gave leave to appeal from the registrar's judgment and also from his own refusal to hear the application. In my opinion the deputy judge in so declining jurisdiction was wrong. I think that he had power to order a new trial. The point seems to be covered by the express language of s. 93 of the Act of 1888, which says that "The judge shall . . . . in every case whatever have the power if he shall think just to order a new trial." It is difficult to see that those words "in every case whatever" do not include the case before us. It was further contended for the defendants that there was an appeal directly to this Court from the decision of the registrar under s. 120. But the difficulty in the way of that contention is that s. 120 requires as a condition of the right to appeal in cases in which the amount claimed does not exceed 20*l.* that "the judge . . . . shall grant leave to appeal," which presumably means the judge who tried the case; and here the case was tried before the registrar, whereas the leave to appeal was given not by the registrar but by the deputy judge. It is unnecessary for us to decide this matter as we are sending the case back for the hearing of the application for a new trial, but if the only appeal in this case were direct from the registrar under s. 120 I much doubt whether under the circumstances of the case we could entertain it.

LUSH J. Two questions have been raised on this appeal; one is whether the deputy county court judge had power under s. 93 to order a new trial when the original hearing was not before him but before the registrar; and the other is whether, where there has been a hearing and determination by the registrar, the deputy judge had power under s. 120 to grant leave to appeal. I agree that the deputy judge was wrong when he came to the conclusion that he had no power under s. 93 to hear the application for a new trial, and for this reason. The registrar has power under s. 92, in cases where the amount claimed does not exceed 2*l.*, to hear and determine the dispute between the parties, but his jurisdiction is derivative. It is only

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by leave of the county court judge that he can sit to hear such cases, and when he does so he sits as representing the judge. That being so, when s. 93 says that "every judgment and order of the Court, except as in this Act provided, shall be final and conclusive between the parties" it includes a judgment or order of a registrar sitting for the judge; and when the section goes on to say "The judge shall also in every case whatever have the power if he shall think just to order a new trial" the operation of this latter clause must be treated as co-extensive with that of the preceding clause, and as applying to every case whether heard before the judge or before the registrar. I fail to see how it can be contended that the words "in every case" must be construed to exclude cases in which the adjudication was by the registrar. It seems to me that the wide phraseology of that section was chosen in order to give the judge power to order a rehearing in every case whether the person appealed from was himself or his representative. With regard to the right of appeal direct to this Court from the registrar I incline to the view that the county court judge has power to grant leave to appeal although the original adjudication was by the registrar. Speaking for myself, I do not think that it was intended by that section to confer upon the registrar the power to give or withhold leave to appeal. As I have said, the jurisdiction of the registrar is entirely derivative, and I do not think that one could construe s. 92 to mean that in addition to adjudicating the registrar has power to exercise the jurisdiction given to the judge by s. 120 of granting leave to appeal. I am strongly inclined to think that the expression "the judge" in s. 120 means the county court judge alone, and does not include the registrar when sitting for him. However it is not necessary to decide the question. The case will go back to the deputy judge to exercise his jurisdiction under s. 93 and to entertain the application for a new trial.

Appeal allowed.

Solicitors for appellants: *Oldman, Cornwall & Wood Roberts.*
Solicitor for respondent: *A. E. Eves.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1912
May 17, 24.

In re A DEBTOR, No. 211 OF 1912.

Bankruptcy—Act of Bankruptcy—Non-compliance with Bankruptcy Notice to pay Judgment Debt—Notice of Act of Bankruptcy committed by Judgment Creditor—Subsequent Adjudication of Judgment Creditor—Relation back of Trustee's Title—Invalidity of Bankruptcy Notice—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*); *s.* 43.

A judgment debtor was served by his judgment creditor with a bankruptcy notice to pay the amount of the debt or secure or compound for the same. Previously to the service of the notice the judgment creditor had himself committed an act of bankruptcy in respect of which he was subsequently adjudicated bankrupt and a trustee was appointed in his bankruptcy:—

Held by Cozens-Hardy M.R. and Kennedy L.J. (Buckley L.J. dissenting), that, having regard to the relation back of his trustee's title, the judgment creditor was not in a position to issue and serve the bankruptcy notice, and that a receiving order which had been made upon the debtor in respect thereof must be discharged.

APPEAL from a receiving order made against the debtor by the registrar in bankruptcy on March 12, 1912.

On August 15, 1911, F. S. Grosvenor obtained a final judgment for 1750*l.* against the debtor. On October 6, 1911, Grosvenor committed an act of bankruptcy by failing to comply with a bankruptcy notice which had been served upon him on September 28, 1911. On October 18 a bankruptcy petition was presented against him, upon which a receiving order was made on November 17, followed by an adjudication of bankruptcy on December 8, and the appointment of a trustee in bankruptcy on December 30.

On November 2, 1911, Grosvenor issued, and on November 9 served upon the debtor, a bankruptcy notice in respect of the judgment debt.

On November 14 the debtor became aware of the bankruptcy petition which was then pending against Grosvenor, and he did not comply with the bankruptcy notice.

On February 16, 1912, a bankruptcy petition was presented against the debtor by Grosvenor's trustee in bankruptcy, and on March 12, 1912, a receiving order was made against the debtor.

C. A. 1912

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The debtor appealed, and moved to discharge the receiving order.

Woodgate, for the appellant. The effect of the commission of an act of bankruptcy by Grosvenor on October 6 followed by adjudication and the appointment of a trustee in bankruptcy was that he was not in a position to issue the bankruptcy notice of November 2 against the debtor. By virtue of s. 43 of the Bankruptcy Act, 1883, the title of the trustee in Grosvenor's bankruptcy related back to October 6, so that Grosvenor on November 2 was not a creditor of the debtor, and the bankruptcy notice was therefore wholly bad.

[BUCKLEY L.J. On November 2 Grosvenor could have issued a writ and the trustee in his bankruptcy could have proceeded with the action. Why could he not equally issue a bankruptcy notice ?]

[*Hansell*, for the respondent, referred to *Ponsford, Baker & Co.* v. *Union of London and Smith's Bank* (1) and *McCarthy* v. *Capital and Counties Bank*. (2)]

Those cases do not conclude the point in the present case.

[BUCKLEY L.J. By whom could the bankruptcy notice of November 2 have been issued ?]

There was no one in a position to issue it. There was no trustee at that time.

The effect of the relation back of the trustee's title was dealt with by Lord Esher in *In re Pollitt, Ex parte Minor* (3), where he said : "The title of the trustee in the subsequent bankruptcy related back to that act of bankruptcy. What does that mean ? The result of the relation back is, that all subsequent dealings with the debtor's property must be treated as if the bankruptcy had taken place at the moment when the act of bankruptcy was committed." At that moment, therefore, in this case Grosvenor was not a creditor within s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883.

In *Ponsford, Baker & Co.* v. *Union of London and Smith's Bank* Fletcher Moulton L.J. (4) said that until commission of the act of bankruptcy he (the debtor) was beneficial owner of his assets,

(1) [1906] 2 Ch. 444.
(2) [1911] 2 K. B. 1088.
(3) [1893] 1 Q. B. 455, 457.
(4) [1906] 2 Ch. at p. 452.

but by the act of bankruptcy his title was no longer absolute, but was contingent on there being no bankruptcy petition leading to a receiving order.

When that contingency happens the debtor has no title at all. And at p. 454 the Lord Justice says: "The safe and, in our opinion, the right course for the Court to pursue after notice of an act of bankruptcy on the part of the plaintiff is to direct the money recovered from the defendant to be kept in Court until it shall be seen whether the person who is entitled to it is the plaintiff or the representative of his estate. This is the natural and proper result of the action, because the Court being made aware of the act of bankruptcy, is informed of the flaw in the plaintiff's title, and while it can decide that the plaintiff is liable to pay, cannot at the moment decide who is entitled to receive the money recovered under the judgment." But assuming that the judgment creditor is after the commission of an act of bankruptcy (in respect of which he is subsequently adjudicated a bankrupt) still entitled to enforce the judgment by the issue of a bankruptcy notice, then it is submitted that the effect of the debtor having notice of an act of bankruptcy committed by the creditor during the currency of the bankruptcy notice is to relieve him from complying therewith: *Ponsford, Baker & Co.* v. *Union of London and Smith's Bank* (1); *McCarthy* v. *Capital and Counties Bank.* (2) Those two authorities go to shew that the judgment creditor is not entitled to require the debtor to pay the money to him. Upon a writ no doubt the debtor would be ordered to pay into Court, but not so in the case of a bankruptcy notice, which is a peculiar remedy. It does not require payment into Court: *In re a Debtor.* (3) The bankruptcy notice requires the debtor to pay the judgment creditor or to secure or compound to his satisfaction or that of the Court.

A bankruptcy notice must name a person entitled to receive the debt, and an address at which it can be paid: *In re Stogdon* (4); *In re Beauchamp* (5); *In re a Debtor.* (6)

Hansell, for the respondent, the petitioning creditor. As to

(1) [1906] 2 Ch. 444.
(2) [1911] 2 K. B. 1088, 1092.
(3) [1908] 2 K. B. 692.
(4) [1895] 2 Q. B. 534.
(5) [1904] 1 K. B. 572.
(6) [1912] 1 K. B. 53.

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the first point, the person entitled to issue the bankruptcy notice was the person in whom at the moment of issue the judgment was vested. That person was Grosvenor.

As to the second point, it is argued that the effect of the bankruptcy notice is that the debtor can do nothing, and can properly pay nobody for three months. In other words he gets that moratorium which Fletcher Moulton L.J. in *Ponsford, Baker & Co.* v. *Union of London and Smith's Bank* (1) said he was not entitled to. It is no defence to an action to plead that the plaintiff has committed an act of bankruptcy of which the defendant has notice: *Foster* v. *Allanson.* (2)

[KENNEDY L.J. That is merely historical now. A code is furnished by ss. 45, 46, and 49 of the Act of 1883.]

Sect. 4, sub-s. 1 (*g*), of the Act was not intended to affect the obligation of a debtor to pay his debt. If the debtor is willing to pay he ought to be protected: *McCarthy* v. *Capital and Counties Bank.* (3) The object of the sub-section was to help honest debtors, and not to provide a way of escape from payment for those who are dishonest.

As to the "address" cases, in *In re Stogdon* (4) the bankruptcy notice was held bad because the address given was such as to mislead the debtor. The address must be the real address of the place where the creditor is to be found during the seven days. Those cases do not affect the present question.

Woodgate in reply. The alternatives given by the bankruptcy notice, namely, to secure or compound for the amount of the debt, are not to cure any defect in the creditor's right to serve the notice. They do not come into operation where the notice is wholly bad. Sect. 4, sub-s. 1 (*g*), is a penal provision and ought not to be construed against the debtor. *Foster* v. *Allanson* (2) has no application to the present case.

[In reply to KENNEDY L.J., *Hansell* also referred to *In re Low* (5), *In re a Judgment Debtor* (6), and *In re a Debtor.* (7)]

Cur. adv. vult.

(1) [1906] 2 Ch. 444.
(2) (1788) 2 T. R. 479.
(3) [1911] 2 K. B. 1088.
(4) [1895] 2 Q. B. 534.
(5) [1895] 1 Q. B. 734.
(6) [1908] 2 K. B. 474.
(7) [1911] 2 K. P. 718.

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May 24. COZENS-HARDY M.R. This is an appeal by the debtor against a receiving order made on March 12, the act of bankruptcy relied upon being the non-compliance with a bankruptcy notice dated November 2 and served on November 9, 1911. The person who issued the bankruptcy notice was Grosvenor, who had obtained a final judgment for 1750*l.* in an action against the debtor. It appears, however, that on October 6 Grosvenor himself committed an act of bankruptcy, upon which a petition was presented on October 18, and a receiving order was made on November 17. The debtor heard of the pending petition against Grosvenor on November 14, shortly before the receiving order was made, and on December 8 Grosvenor was adjudicated a bankrupt. Grosvenor's trustee on February 16 presented a petition based on the debtor's failure to comply with the bankruptcy notice of November 2. In these circumstances it is contended by the appellant, first, that the bankruptcy notice was wholly bad, inasmuch as by virtue of the relation back of the trustee's title to the act of bankruptcy Grosvenor was not, at the date of serving the bankruptcy notice, a creditor of the debtor, and, secondly, that, even if he was such a creditor at the date of the notice, non-compliance with its terms was not such an act as would justify the making of a receiving order.

Now, on the first point, I think Grosvenor was a creditor on November 2. He might in the case of any debtor have issued a writ and obtained a judgment before further proceedings had been taken in the bankruptcy. It is true that his title was liable to be defeated, and was in fact defeated, but that cannot affect the validity of the notice, so far as his position as a creditor is concerned.

The second point seems to me to present far greater difficulty. The debtor, with notice of Grosvenor's act of bankruptcy, could not safely or properly pay the debt claimed by Grosvenor, and it is unreasonable that the debtor should be made bankrupt for not having paid a debt which the trustee might be, and in the actual event was, entitled to claim.

A somewhat similar difficulty arose in two cases in this Court, *Ponsford, Baker & Co.* v. *Union of London and Smith's Bank* (1)

(1) [1906] 2 Ch. 444.

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and *McCarthy* v. *Capital and Counties Bank.* (1) In each of those cases the Court took the view that a plaintiff who had, to the knowledge of the defendant, committed an act of bankruptcy ought not to be allowed to sign judgment against a bank, the bank being willing to pay the money into Court to abide the result and to be ultimately paid out either to the plaintiff or to his trustee in bankruptcy as the case might be. The statutes clearly provide that payments shall not be made to the debtor with knowledge of the act of bankruptcy, "thus indicating that the law does not consider him the proper person to collect the debt": per Fletcher Moulton L.J. (2) I do not see that the analogy of those cases can be applied here. The bankruptcy proceedings depend upon s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, a section which, having regard to its penal consequences, has always been construed strictly. The bankruptcy notice must require the judgment debtor to pay the judgment debt "in accordance with the terms of the judgment or to secure or compound for it to the satisfaction of the creditor or of the Court." In my opinion the words "to secure to . . . . the satisfaction of the Court" do not impose upon the debtor the liability to give security for the payment of the debt to the person who may thereafter be held to be entitled to receive it. I think the notice must be given by a person competent to receive and give a good discharge for the judgment debt, and that the subsequent alternatives are only inserted in relief of the debtor and to enable him to say "although I cannot at once pay the cash I can give good security for the debt."

The decisions of this Court, with reference to the necessity of giving an address at which the creditor may be found, strongly support this view. The debtor is entitled to know, not only where he can find the creditor for the purpose of making a payment, but also where he may be found for the purpose of trying to secure or compound for it to the satisfaction of the creditor. In the language of Vaughan Williams L.J., delivering the judgment of this Court in *In re Beauchamp* (3), "If the creditor, after the service of the notice, abandoned his place of address so that it ceased to be a place where at reasonable times

(1) [1911] 2 K. B. 1088. (2) [1906] 2 Ch. 453.
(3) [1904] 1 K. B. 572, at p. 584.

the creditor could be found, (or some authorized agent on his behalf), to receive payment of the judgment debt or to deal with the question of security, the bankruptcy notice would cease to be efficient." The decision of this Court in *In re a Debtor* (1) also supports the view which I have expressed.

For these reasons, I think there has not been an act of bankruptcy upon which a receiving order could properly be made. It follows that the appeal must be allowed and the receiving order must be discharged.

BUCKLEY L.J. On November 2, 1911, Grosvenor issued and on November 9 served upon the debtor a bankruptcy notice in respect of a judgment for 1750*l.* Previous to those dates Grosvenor had committed an act of bankruptcy by making default in complying with a bankruptcy notice which had been served upon him on September 28. In respect of that act of bankruptcy Grosvenor was in December adjudicated bankrupt. On February 16, 1912, the trustee in bankruptcy of Grosvenor presented a bankruptcy petition against the debtor founded upon the act of bankruptcy committed by him in failing to comply with the bankruptcy notice served upon him by Grosvenor, and upon that petition a receiving order has been made. This is a motion to discharge the receiving order. The ground advanced is that the bankruptcy notice of November 2 was bad. The question for decision is whether Grosvenor could under the circumstances give and did give a good bankruptcy notice to the debtor.

The bankruptcy notice was in the usual form and called upon the debtor to pay to Grosvenor the 1750*l.*, the amount due on the judgment, or to secure or compound for the same to the satisfaction of Grosvenor or of the Court. It has been argued that having regard to Grosvenor's position the debtor could not pay Grosvenor. This is not so. He could pay him but could not pay him safely. Had he paid him he might have had to pay over again. He stood in the same position as any other debtor from whom Grosvenor might have demanded and sub modo as in the cases presently mentioned have enforced payment. Having

(1) [1908] 2 K. B. 692.

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regard to the fact that Grosvenor might be (as he was) adjudicated bankrupt, the title of the trustee, should there be a bankruptcy, would relate back so that the payment would have been made to the wrong person.

It has been decided by this Court in *Ponsford, Baker & Co.* v. *Union of London and Smith's Bank* (1) that, on the one hand, a man who has committed an act of bankruptcy can sue in respect of a debt due to him, and, on the other, that the debtor is not bound to pay him when it may result that payment ought to be made to his trustee. The obligation of the defendant to pay is not affected. The difficulty arises as to the person who is entitled to receive. This Court there cut the knot by saying that under such circumstances the obligation of the debtor to pay was to be enforced, but that the money should come into Court and remain there until it was seen whether the plaintiff or his trustee in bankruptcy was the person who could give a discharge. This was followed by the case of *McCarthy* v. *Capital and Counties Bank.* (2) The result thus arrived at in the case of an action to recover a debt is reproduced in substance by the provisions of s. 4, sub-s. 1 (*g*), of the Bankruptcy Act. The bankruptcy notice offers to the debtor certain alternatives. The first is to pay in accordance with the terms of the judgment. This was an alternative with which the debtor could comply, but I agree that it was one with which he could not safely comply. So soon as the bankruptcy notice has been served upon the judgment debtor the next step is with him. If he cannot safely take one alternative there is nothing to prevent his taking another. He cannot say "Of the alternative acts of which you required me to do one there was one which I could not do safely, so I am justified in doing none." If he cannot safely take the alternative of paying the judgment creditor he has but to apply to the Court in bankruptcy and offer to secure the amount to the satisfaction of the Court. The order would be similar to that in *Ponsford, Baker & Co.* v. *Union of London and Smith's Bank* (1), that the amount be paid into Court. Alternatively the order might be that it be secured to the satisfaction of the Court. The judgment debtor is in no difficulty. Every alternative is possible to him, but one is not

(1) [1906] 2 Ch. 444. (2) [1911] 2 K. B. 1088.

expedient, for it is not safe. He has but to select another which is safe.

We were pressed with cases, such as *In re Stogdon* (1), where a bankruptcy notice has been held to be bad which does not give an address at which the creditor will be found. What has been held in those cases is that the notice is bad because the judgment creditor has named as one alternative a course which the judgment debtor cannot take. He would be within his rights if he waited till the last moment and then went to pay at the address named. If the address was a wrong address he would by that fact be prevented from complying with the notice. Therefore the notice is bad.

That is not the case here. The creditor can do the act required. The only point is that he cannot do it safely, and that to my mind makes all the difference. Reference was also made to *In re a Debtor* (2), where the judgment was to pay to the registrar of the county court and the bankruptcy notice required payment to the creditor. The notice did not require payment in accordance with the terms of the judgment. The notice in the present case does. That case has no application.

If it be held that upon the ground suggested the bankruptcy notice is bad it will follow that under circumstances such as these a bankruptcy notice cannot be given at all. The judgment creditor is the only person who can give it, for his trustee is not yet appointed. If an action had not already been brought the judgment creditor is the person who could bring the action. The action having been brought the judgment debt is vested in the judgment creditor, and he has in him all rights which result from the existence of the judgment. One of these rights is to give a bankruptcy notice. In my judgment the bankruptcy notice here was valid, and the receiving order was rightly made. This appeal therefore ought, I think, to be dismissed.

I desire to add that it is a principle of the law of bankruptcy that if a man be insolvent it is desirable that at the earliest possible moment means shall be available to protect his assets for the benefit of all his creditors. If the view taken by the majority of this Court be right, it follows that a debt which is in

(1) [1895] 2 Q. B. 534. (2) [1908] 2 K. B. 692.

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all respects capable of forming the subject of a bankruptcy notice to the debtor is rendered incapable of being used for that purpose by the fact that the creditor has himself committed an act of bankruptcy which has not yet resulted in the appointment of a trustee. The result will be that the moment at which that debt can be used as the foundation of proceedings for the protection of the debtor's assets for the benefit of all his creditors will be postponed until a trustee has been appointed in that creditor's bankruptcy. It is a serious matter if that be the law.

KENNEDY L.J. Having had the opportunity of reading the judgment which has been delivered by the Master of the Rolls, I concur in the reasons which he has given for that judgment and in its conclusions.

Appeal allowed.

Solicitors: *Coote & Richards; Osborn & Osborn.*

G. A. S.

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[IN THE COURT OF APPEAL.]

DENNY, MOTT & DICKSON, LIMITED *v.* STANDARD EXPORT LUMBER COMPANY, LIMITED.

Arbitration — Umpire — Appointment by Court—Originating Summons—Arbitrator made Respondent to Summons—Arbitration Act, 1889 (52 & 53 *Vict.* c. 49), *s.* 5.

Disputes having arisen between the buyers and sellers as to the quality of timber supplied under a written agreement of sale, the parties signed a submission to arbitration by which the questions in dispute were referred to the determination of two arbitrators, who were empowered to name an umpire. The arbitrators were duly nominated, but failed to agree upon their award; they also failed to appoint an umpire after a notice on behalf of the buyers under s. 5 of the Arbitration Act, 1889, had been served upon them. The buyers then took out an originating summons under the same section asking for the appointment of an umpire by the Court. This summons was served upon the sellers' arbitrator, but not upon the sellers themselves, as they neither resided nor carried on business within the jurisdiction of the Court. On the hearing of the summons both before the Master and the judge the sellers' arbitrator appeared and contended that there was no power to

make him a respondent to the summons, and, further, that a trade expert and not a legal umpire should be appointed. The Master appointed a legal umpire, and his order was affirmed on appeal to a judge in chambers :—

Held by Vaughan Williams, Buckley, and Kennedy L.JJ., that as a general rule a summons asking for the appointment of an umpire by the Court ought to be served on the other party to the arbitration and not on his arbitrator, but (hæsitante Vaughan Williams L.J.) that upon the facts of the case the sellers' arbitrator had so acted in the interest of the sellers throughout the proceedings that he ought not to be dismissed as a respondent to the originating summons.

Held, further, by Buckley and Kennedy L.JJ., that the application to the Court to appoint an umpire might properly have been made ex parte.

APPEAL from chambers. The circumstances giving rise to the appeal were shortly as follows.

On March 9, 1910, the Standard Export Lumber Company, Limited, a company registered in the United States of America and carrying on business at New Orleans, by an agreement in writing sold to Denny, Mott & Dickson, Limited, a company registered in England and carrying on business in London, a quantity of sawn pitch pine timber of certain qualities and at certain prices, to be shipped c.i.f. from Gulf Port in the Gulf of Mexico to Delagoa Bay.

A quantity of timber was shipped under the contract, and after arrival the buyers complained that a portion of it was of inferior quality and that by reason thereof claims had been made upon them by sub-purchasers to whom the timber had been tendered in fulfilment of contracts of sale entered into with them. The allegations of inferior quality were denied by the sellers, the Standard Export Lumber Company. Eventually by an agreement in writing, dated April 24, 1911, Messrs. Denny, Mott & Dickson and the Standard Export Lumber Company agreed to refer the dispute between them to arbitration, the former appointing Mr. J. N. Lamb, of Liverpool, as their arbitrator, and the Standard Export Lumber Company appointing Mr. C. T. Taylor, of Liverpool, as theirs; by the submission power was given to the arbitrators to name an umpire, the decision of the arbitrators or their umpire to be final and binding on both parties. The arbitrators so appointed failed to agree upon their award and also failed to agree upon an umpire.

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On July 7, 1911, the solicitors for Denny, Mott & Dickson signed a notice calling upon the arbitrators "within seven days from the service hereof (pursuant to s. 5 of the Arbitration Act, 1889) to appoint an umpire under the submission to arbitration." The notice was duly served upon both arbitrators, but they failed to comply with its requirement.

On July 19, 1911, the solicitors for Denny, Mott & Dickson issued an originating summons under Order LIV., r. 4 (*f*), the material parts of which were in these terms: "Let James M. Lamb and Charles Thomas Taylor attend the Master on July 26 on the hearing of an application on the part of Denny, Mott & Dickson, Limited, ... for an order that an umpire may be appointed under the submission between themselves and the Standard Export Lumber Company, Limited, dated April 24, 1911, of a dispute which has arisen with reference to the quality of certain pitch pine timber shipped in the s.s. *Zamora* from Gulf Port to Delagoa Bay under a contract dated March 9, 1910, pursuant to s. 5 of the Arbitration Act, 1889 . . . ." (1) This summons was duly served on both the arbitrators, but was not served on

(1) The Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 5: "In any of the following cases:—

"(*a*) Where a submission provides that the reference shall be to a single arbitrator, and all the parties do not after differences have arisen concur in the appointment of an arbitrator:

"(*b*) If an appointed arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties do not supply the vacancy:

"(*c*) Where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him:

"(*d*) Where an appointed umpire or third arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy:

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator.

"If the appointment is not made within seven clear days after the service of the notice, the Court or a judge may, on application by the party who gave the notice, appoint an arbitrator, umpire, or third arbitrator, who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties."

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the Standard Export Lumber Company, who were not within the jurisdiction. On July 31, 1911, this summons was heard by a Master. It was contended on behalf of Denny, Mott & Dickson, Limited, that a legal umpire should be appointed, while in the affidavits filed by and on behalf of Taylor it was contended that the umpire ought to be an expert in the timber trade. It was further contended by counsel before the Master that Taylor was wrongly named as respondent to the summons, that no order could be made against him, and that, if such an order were made, it could not affect the Standard Export Lumber Company, Limited, who were not parties to the summons. Eventually the Master made an order appointing Mr. G. Wallace, K.C., umpire; he also extended the time for making the award for three months and made the costs costs in the arbitration. Taylor gave notice of appeal to the judge in chambers, by which he asked that the Master's order should be reversed and that the application of Denny, Mott & Dickson, Limited, should be dismissed, or, in the alternative, that the Master's order should be varied by the appointment of a timber trade expert as umpire. At the hearing of the appeal before Lush J. on October 13, 1911, it was contended that Taylor was wrongly named as respondent to the summons, and that the summons had not been served on the Standard Export Lumber Company, Limited, at New Orleans. By his order the learned judge dismissed the appeal, extending the time for making the award for three months, and directed that the Standard Export Lumber Company, Limited, should be at liberty to apply to discharge the order of July 31, 1911, appointing an umpire, and also the present order, within one month. He further directed that the costs of the appeal should be costs in the arbitration, subject to any contention by the Standard Export Lumber Company, Limited, that the costs ought to be borne by any party to the summons.

On October 24, 1911, Taylor gave notice of appeal to the Court of Appeal from the order of Lush J.

Atkin, K.C. (*Jowitt* with him), for Taylor. No doubt the arbitrators were properly served with the original summons calling on them to appoint an umpire, but an arbitrator is not a

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"party" to the proceedings in the arbitration between the sellers and buyers and is not properly named as respondent to an originating summons by which one of the parties seeks to obtain the appointment of an umpire by the Court. The Standard Lumber Export Company, Limited, were the proper respondents to such an originating summons, and it is immaterial that, as they were not within the jurisdiction, they could not be forced to appear as respondents. The appeal should therefore be allowed and the summons dismissed as regards Taylor; while as regards the Standard Export Lumber Company, Limited, who have not been made parties, the order should be set aside as invalid. [He referred to *In re Anglo-Italian Bank and De Rosaz.* (1)]

Stuart Bevan, for Denny, Mott & Dickson, Limited. Taylor was properly made a respondent to the originating summons. Even if he was not in the first instance the proper respondent, the affidavits shew that the objection made on his behalf was not so much that he was made a respondent as that the Standard Export Lumber Company, Limited, were not made respondents. In substance he fought the battle of the Standard Company all the way through, and cannot now complain that he was not a proper party. His proper course would have been not to appear to the summons, or to ask for it to be dismissed against him. It is plain, upon the express terms of s. 5 of the Arbitration Act, 1889, that the arbitrators must be served with the notice calling upon them to appoint an umpire if the failure to appoint an umpire is their failure; and the subsequent originating summons should, it is submitted, be served on the same person upon whom the notice to appoint an umpire was served. It is immaterial that the sellers were not served; the application might have been made ex parte. [He cited *Wilson* v. *Church* (2); *In re Eyre and Leicester Corporation.* (3)]

Atkin, K.C., in reply.

Cur. adv. vult.

Dec. 12. VAUGHAN WILLIAMS L.J. In this case there was a failure by two arbitrators acting in an arbitration between

(1) (1867) L. R. 2 Q. B. 452. (2) (1878) 9 Ch. D. 552.
(3) [1892] 1 Q. B. 136.

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Messrs. Denny, Mott & Dickson, Limited, and the Standard Export Lumber Company, Limited, to agree upon an umpire, and Messrs. Denny, Mott & Dickson gave notice in writing pursuant to s. 5 of the Arbitration Act, 1889, to the respective arbitrators to appoint an umpire. After the lapse of seven days from the service of the notice Messrs. Denny, Mott & Dickson took out an originating summons in form, calling upon Charles Thomas Taylor and J. M. Lamb, the respective arbitrators acting on behalf of themselves and the Standard Export Lumber Company, to attend on an application on their behalf for an order that an umpire might be appointed under the submission between themselves and the said Standard Company of a dispute which had arisen with reference to the quality of certain pitch pine timber shipped on the steamship *Zamora* from Gulf Port to Delagoa Bay, neither of which is within the jurisdiction. By the said summons they named as respondents the two arbitrators, but not the Standard Company. The Standard Company is a company incorporated in New Orleans and does not appear to carry on business in England, whence it follows that the originating summons cannot be served on the Standard Company.

The case, as argued before us, was argued throughout on the basis that Mr. Taylor, in the matter of appointing an umpire, was really acting on the instructions of the Standard Company, who had directed him to insist upon the umpire being a trade umpire, whereas Messrs. Denny, Mott & Dickson instructed Mr. Lamb, their arbitrator, to insist on the umpire being a legal umpire, and there were set forth in the affidavit in support of the summons the reasons upon which it was alleged that a legal arbitrator was preferable. This affidavit does not mention the fact that the Standard Company is a company incorporated in New Orleans and not within the jurisdiction. In the affidavit of Taylor, in reply to the affidavit of Murdoch Sinclair Allan in support of the application to which I have already referred, he deals exclusively with the question whether the umpire should be a legal umpire or a trade expert. Mr. Taylor did not, in the affidavit used before Master Wilberforce, mention the ground that the affidavit of the applicants disclosed no cause of action against

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him, but it was admitted before us that this ground was taken before the Master, although counsel for the respondents said it was not the main ground. It is obvious that this dispute as to whether the umpire should be a legal umpire or a trade expert was a dispute between the parties to the arbitration, and not between the arbitrators. I do not see how, having regard to the contents of the affidavit in support of the summons, Mr. Taylor could well avoid dealing alternatively in his affidavit in paragraph 7 with the qualifications of the trade experts named by him or his counsel in argument after the Master had rejected the first ground, putting forward the reasons he offered to the other arbitrator for accepting a trade expert as an umpire even though he contended that he ought not to have been summoned. I do not think that so to do amounted to appearing on behalf of the Standard Company.

I have looked at all the cases which I can find of proceedings to obtain the appointment by a judge of an umpire or a third arbitrator, and I cannot find any one in which the arbitrator was made a respondent to the summons, and I cannot understand why he should be, unless personal misconduct is imputed to him. In every case in which the dispute is really between the parties to the submission, the party to the arbitration taking out the summons has to make the other party the respondent. I have no doubt that, in a case where the parties to the submission to arbitration differ on the question whether the umpire to be agreed on by the arbitrators should be a legal umpire or a trade umpire, and instruct their respective arbitrators in accordance with their respective wishes, this is a dispute between the two parties to the submission, and if a summons is taken out by one party for the purpose of getting the Court or a judge to appoint an umpire, it is a dispute between the parties and the summons should be served by the applicant on the other party to the submission. I can find no case in which such a summons has been served upon the arbitrators or one of them, and I have no doubt that the other party to the submission ought to be a respondent on that summons and that the arbitrators ought not. Nor do I think that the fact that the other party to the submission is out of the jurisdiction justifies the service on the

arbitrators of the originating summons. Such a summons presupposes a cause of action by the applicant against the respondent or respondents, and I think that the affidavit in this case discloses no such cause of action.

Reliance is placed upon the fact that the respondent Taylor the arbitrator named by the Standard Export Lumber Company goes into the question whether the umpire should be a legal umpire or a trade umpire, and answers the arguments set forth in the affidavit by Mr. Sinclair Allan on behalf of Denny, Mott & Dickson. But when the summons came on, it was only after the Master had refused the submission by Mr. Taylor that there was no cause of action disclosed against him that his counsel proceeded to argue the merits on the question which kind of umpire should be appointed. I think that thereupon the summons should have been dismissed as against Mr. Taylor. I have not to consider whether in this case the Master could have disposed of the question ex parte and appointed an umpire ex parte in the absence of the Standard Export Lumber Company, since, even if the Master could have disposed of the originating summons ex parte, this would not have given the Master any right to treat Mr. Taylor (the arbitrator) as a respondent or otherwise as a party properly made a respondent to the summons. It may be that the Master (or judge, as the case may be), when applied to by one party to appoint under the Arbitration Act, 1889, s. 5, a single arbitrator or an umpire, may order any person to attend before him and give him such information as he requires, or may require any person who happens to be before him and who is likely to be able to afford him the information he requires to give such information, but this does not make the person supplying the information a party to the originating summons.

It was argued, however, in the present case that although an arbitrator against whom the originating summons disclosed no cause of action would not, under such circumstances as I have just stated, become a party to the originating summons, yet Taylor did become a party in the present case because he chose by affidavit to state, in answer to the affidavit of Mr. Sinclair Allan, the reasons why he and the other arbitrator could not

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agree upon an umpire and stated why he preferred a trade umpire, just as the affidavit served with the originating summons stated the grounds why Mr. James M. Lamb, the arbitrator nominated by Denny, Mott & Dickson, preferred a legal umpire. Reliance was placed also on the fact that the counsel appearing on behalf of Mr. Taylor went into argument before the Master to shew that a trade umpire ought to be appointed, and thus elected as respondent, whether properly made a respondent or not, to assume that position, and further elected to appeal to the judge against the order, and by his notice of motion by way of appeal asked affirmatively that a trade expert be appointed umpire, which was a matter with which he had nothing to do except in the interests of the Standard Company.

But it seems to me that before one accepts the conclusion invited by this argument, namely, that Mr. Taylor accepted voluntarily the position of respondent acting on behalf of the Standard Export Lumber Company, one must take into consideration, so far as his affidavit is considered, that he could not be certain that the Master would accept his contention that he as arbitrator was entitled to be discharged from the summons with costs against the applicants, since he might well think, though wrongly, that it might be held by the Master that his reasons for refusing to agree to nominate a legal umpire were insufficient and he to blame, and he therefore set forth in his affidavit his reasons for insisting on a trade umpire in answer to that portion of Sinclair Allan's affidavit in which he set forth his reasons for preferring a legal umpire, that is to say, before coming to the conclusion that he voluntarily became responsible. Secondly, I think one must bear in mind that it appears on the evidence contained in paragraph 4 of the affidavit of Frederick Hugh Capron of November 4, put in before us on the hearing of the appeal, that the counsel for Mr. Taylor raised before Master Wilberforce the objection "that the summons was brought against the said Charles Thomas Taylor, as respondent thereto, although it disclosed no cause of action against him, and that it was therefore submitted that he was wholly a wrong party to the application and that no order should be made against the said Charles Thomas Taylor. It was also incidentally pointed

out that any such order if made would be invalid and inoperative as against the Standard Export Lumber Company, Limited, who were no parties to the proceedings." That incidental submission was obviously an argument which might reasonably be used why the arbitrator should not be made a respondent to the originating summons. He says that there is no cause of action against him and even if the order was made it would not affect the Standard Lumber Company. And in paragraph 4 Mr. Capron states that "Master Wilberforce having overruled the above objection counsel for the said Charles Thomas Taylor stated that, under protest, and reserving all the rights of the said Charles Thomas Taylor against the overruling of the said Master Wilberforce and any order which he might make, there were, in the opinion of the said Charles Thomas Taylor, reasons why a person in the timber trade and not a lawyer should be appointed as umpire."

Moreover it was admitted before us by the counsel for the respondents that this objection was taken before the Master, although counsel for the respondents said it was not the main ground.

Thirdly, one must take into consideration that the notice of appeal before us asks amongst other things that "the application herein to Master Wilberforce may be dismissed with costs," which means, as I understand it, may be dismissed on the ground that Taylor ought not to have been made a party.

The same ground of appeal was taken in the appeal to Lush J. On the whole, I should not be inclined to come to the conclusion that Mr. Taylor so took upon himself at any point in these proceedings the position of a respondent to the originating summons willing, at his own risk, to obtain a decision on the point in dispute between the two parties to the submission, namely, whether the umpire should be a trade expert or a lawyer, but if my colleagues draw this conclusion I will not differ, provided no costs are given against Mr. Taylor.

Taking my view of the evidence and facts it is plain that originally he ought not to have been a respondent to the originating summons and was entitled to have his name struck out as respondent with costs against the applicant, and I think he never

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abandoned this point, which on the affidavit of Capron and the admission of opposing counsel he took before Master Wilberforce, although possibly not as his main point. It is not denied that the Master overruled this point. I do not say that there is no evidence that he argued inter alia the point whether the umpire should be a trade or a legal expert. In fact it is plain he did; but my doubt is whether, on the evidence, one can safely come to the conclusion, either that he did not make the point before Master Wilberforce, that he was a wrong party and ought to be discharged, or that having made it he abandoned it. He was entitled to appeal, as his right was to be dismissed as a respondent with costs to be paid by Denny, Mott & Co. It may be that the Court can, where one of the parties to a submission is not, either in person or by his place of business, within the jurisdiction, make an order ex parte; but I have not to decide this question, and if the Court has not this power, which is a matter of practice not governed by the Arbitration Act, 1889, such power can easily be given by an amendment of the Judicature Act Rules; heretofore no such power has been exercised in practice. Be this how it may, I see nothing in any view of the facts of this case to justify inflicting costs on Mr. Taylor. The utmost I can agree to is to give him no costs and give no costs against him. I quite approve of the insertion in the order of a direction that Denny, Mott & Dickson should give the Standard Company notice of the order of Lush J., and that the month within which the Standard Company are to be at liberty to discharge such order shall be a month from the giving of such notice, and that a rule might well be added to the existing Judicature Act Rules to that effect. I agree, therefore, with the proposed order.

BUCKLEY L.J. The two arbitrators having failed to appoint an umpire, Denny, Mott & Dickson served them with a written notice to appoint an umpire pursuant to s. 5 of the Arbitration Act and subsequently (the seven days having elapsed) made an application to the Court to appoint. That application was made by summons, to which they named as respondents the two arbitrators, but not the Standard Export Lumber Company, the other party to the submission. They took that course for this

reason, that the Standard Company is a company incorporated in New Orleans, is not within the jurisdiction, and cannot be brought before the Court in proceedings under the Arbitration Act. Taylor, the present appellant, was the arbitrator appointed by the Standard Company. He appeared to the summons, took up the gage of battle, and filed affidavits putting forward the contention that a trade umpire ought to be appointed. Amongst them was an affidavit by Mr. Price, a director of Price & Pierce, Limited, who were the agents in this country of the Standard Company, and the persons through whom the contract, the subject of the dispute, had been entered into. Upon those materials the summons came upon July 31 before the Master. At this stage it would have been competent, I think, to Taylor to have asked to be struck out as a respondent to the summons, with costs to be paid by Denny, Mott & Dickson. He did not, however, make that application. Looking at Mr. Capron's affidavit, what he did was to contend that no order should be made against him and that no order could be made against the Standard Company because they were not parties to the proceedings. On the former contention he succeeded, for no order was made against him. On the latter he failed, for an order was made against the Standard Company. As a general proposition, I think it is true that an application of this kind by one party to the submission ought to be served on the other party to the submission and ought not to be served on the arbitrators. That point arises in this way. The statute contains no directions as to who are the parties to be served. The question of proper parties rests, not upon statutory enactment, but upon such practice and procedure as the Court may think proper to adopt as regards the parties which it shall require to be brought before it. As a general proposition I have no doubt that the other party to the submission ought to be a respondent and that prima facie the arbitrators ought not. But had a substantive application to strike Taylor out as respondent been before the Master, in my opinion it ought to have failed, and for this reason. The Master was not in a position to require the Standard Company to be brought before him. He had before him in fact Taylor, who was the best person to protect

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the Standard Company in the matter whose presence he could obtain; and Taylor was a person who had taken up the Standard Company's battle. Under these circumstances I think he would have used a proper discretion if he had determined that he could best adjudicate upon the matter by at least having Taylor before him and hearing him upon his affidavit, as he could not obtain the Standard Company. However this may be, no such substantive application was made to the Master, and in the result he made an order. It is an order which affects Taylor in no single particular. It appoints Mr. Wallace umpire, extends the time for making the award for three months, and makes the costs costs in the arbitration. That was an order against the Standard Company. The Standard Company were not there. It was ex parte as against them. In my opinion it is competent to the Court under such circumstances as the present to make such an order ex parte. To say that it cannot do so is to affirm that the Act is incapable of being rendered effective if one of the parties is out of the jurisdiction. Taylor took that order from the Master to the judge, and by his notice of motion by way of appeal he asked affirmatively that a trade expert be appointed umpire. That was a matter with which he had nothing to do except in the interests of the Standard Company. He thus accepted the position of an actor in the proceedings. Upon that application the judge made an order dismissing the appeal but inserting a provision, which I think should have been found in the Master's order, giving the Standard Company an opportunity of intervening and applying to discharge the order. In my judgment that order was right, but I think it would have been well that it should have contained a direction to Denny, Mott & Dickson to give the Standard Company notice of the order, and that the time limited should have run from the time of giving such notice. The only doubt I have felt in the case is as to whether Taylor ought now to be dismissed as a respondent, and whether any variation ought to be made in so much of the existing orders as makes the costs, other than the costs of the appeal to the judge, costs in the arbitration. In my opinion Taylor ought not now to be dismissed as a respondent. There is no reason for so doing, now that the application has

(unless the Standard Company come in and seek to vary the order) reached its termination. And further I think at no time, having regard to the position which Taylor took up and to the fact that the Standard Company could not be brought in, ought such an order to have been made. The order in this Court I think should be to affirm the order under appeal, but with the following variations. There should be added a direction that Denny, Mott & Dickson shall give the Standard Company notice of the order, and that the month within which the Standard Company are to be at liberty to apply to discharge shall be a month from the giving of such notice. As regards the costs the position was difficult and the point one of novelty. I am prepared to concur in an order that the costs of all parties before the Master and before Lush J. and in this Court shall be costs in the arbitration, subject to any contention by the Standard Company that such costs ought to be borne by any party to the summons. If the Standard Company do raise such a contention, then it should be left open to Denny, Mott & Dickson also to raise any contention of the same kind.

KENNEDY L.J. I have read carefully and considered the judgment of Buckley L.J., and in that judgment I concur.

Appeal dismissed.

Solicitors for Denny, Mott & Dickson, Limited: *Coward & Hawksley, Sons & Chance.*

Solicitors for Taylor: *Trinder, Capron & Co., for Simpson, North, Harley & Co., Liverpool.*

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THE KING *v.* JUSTICES OF THE COUNTY OF LONDON. THE KING *v.* JUSTICES OF THE CITY OF LONDON.

County Rate—County of London—City of London—Exemption of Property situate in City from Liability to County Rate—Rate based on Valuation List including exempted Property—Appeal—To what Quarter Sessions Appeal lies—County Rates Act, 1852 (15 & 16 *Vict. c.* 81), *s.* 22—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 8; *s.* 40, *sub-s.* 3; *s.* 42, *sub-s.* 10.

A county rate having been made for the administrative county of London, the Common Council of the city of London, as overseers of the parish of the city of London, were desirous of appealing against the rate under s. 22 of the County Rates Act, 1852, upon the ground that the total in the valuation list upon which the rate was based included property in the City which was exempted by statute from liability to county rate:—

Held, that the appeal lay to the quarter sessions of the county of London, and not to the quarter sessions of the city of London.

Two rules for prohibition to the quarter sessions of the county of London and the quarter sessions of the city of London respectively against the hearing of an appeal against a county rate.

On October 28, 1910, the assessment committee of the parish of the city of London (1) finally approved the quinquennial valuation list for the years 1911 to 1916 for the said parish. In that list as finally determined by them there appeared the following totals:—

——	Gross Value.	Rateable Value.
Total of hereditaments exclusive of property exempted under 7 Geo. 3, c. 37, &c. .	£ 6,705,598	£ 5,601,928
Total of hereditaments exempted under above statute	36,695	29,412
Grand total	£6,742,293	£5,631,340

(1) By the City of London (Union of Parishes) Act, 1907 (7 Edw. 7, c. cxl.), s. 5, the 112 parishes of the city of London were for the purposes of local government united into one parish by the name of "the parish of the city of London." By s. 11 it was provided that the

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The Common Council did not appeal against the valuation list as so approved. On January 14, 1911, the time for appealing against the valuation list prescribed by s. 42, sub-s. 12, of the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), expired. On April 11, 1911, the London County Council made a rate for the administrative county of London at the rate of 1*s.* 6*d.* in the pound whereby they assessed and charged the city of London the sum of 422,350*l.* 9*s.* 11*d.*, and they issued their precept requiring the Common Council of the City to pay the said sum. That rate was based upon the above-mentioned grand total in the valuation list of 5,631,340*l.* On June 13, 1911, the Common Council as the overseers of the parish gave to the London County Council notice of their intention to appeal against the said rate under s. 22 of the County Rates Act, 1852, to the quarter sessions of the county of London. They also gave notice of intention to prefer a similar appeal to the quarter sessions for the city of London. The grounds of appeal specified in the notices were: That the parish of the City was rated on a sum beyond the full and fair annual value of the property therein liable to be assessed towards the county rate; that the proportions of the rate assessed upon the respective parishes were unequal; that the amount assessed upon the said parish was at a higher proportion of the pound sterling than the amount which by the said rate was authorized to be raised or than was assessed upon the other parishes according to the fair annual value of the rateable property in the said parish liable to be assessed towards the county rate; and that in fixing the assessment on the said parish the London County Council had wrongfully included, in ascertaining the fair annual value of the rateable property therein, properties which should not have been so included, by reason of their being exempted from liability to contribute to the county rate by the provisions of 7 Geo. 3, c. 37, s. 51. A rule for a prohibition was then obtained on

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Common Council should be the overseers of the said parish. And by s. 29 so much of sub-s. 10 of s. 42 of the Local Government Act, 1888, as provided that upon the hearing of any appeals in relation to property in the city of London two justices of the City should be entitled to sit as members of the quarter sessions for the county of London on the hearing of appeals against the quinquennial valuation list was repealed.

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behalf of a Mr. Stanley, a ratepayer of the city of London, to prohibit the quarter sessions for the county of London from hearing the appeal on the ground that they had no jurisdiction to entertain it; and a similar rule was obtained on behalf of the London County Council to prohibit the quarter sessions for the city of London from hearing the appeal on the ground of want of jurisdiction.

Sir Alfred Cripps, K.C., and *Courthope Munroe*, for the London County Council, shewed cause against the first rule and supported the second. The ground of the Common Council's appeal against this county rate is that it is based upon a total which includes the value of certain lands reclaimed from the river Thames under the statute of 7 Geo. 3, c. 37, whereby the said lands were vested in the adjoining owners "free from all taxes and assessments whatsoever," which terms it is said include county rates; and the complaint is that, as the sum assessed upon the City can only be levied upon hereditaments other than those which are exempted from the rate, the effect will be that the hereditaments upon which the rate is levied will have to pay more than 1*s.* 6*d.* in the pound, and consequently the rate will be unequal. In other words the complaint is that the total is wrong. The appeal is brought under the County Rates Act, 1852. By s. 2 of that Act the justices of every county were to appoint a committee for the purpose of preparing a basis or standard for fair and equal county rates, such basis to be founded and prepared rateably according to the full and fair annual value of the several properties. By s. 21 (1) the county rate was

(1) By the County Rates Act, 1852, s. 21, "It shall be lawful for the justices of the peace of the several counties, or divisions of counties in England and Wales, assembled at their general or quarter sessions . . . . to order and direct a fair and equal county rate to be made, ... and for that purpose to assess and tax every parish, township and other place . . . . within the respective limits of their commissions, or within such divisions, rateably and equally . . . . upon the basis or standard hereinbefore mentioned, of the full and fair annual value of the property, messuages, land, tenements and hereditaments rateable to the relief of the poor therein."

Sect. 22: "If the churchwarden or churchwardens, overseer or overseers of the poor, or other inhabitant or inhabitants of any parish, town-

to be made by the justices of the county assembled in quarter sessions upon every parish, township and other place within the limits of their commission upon the basis or standard provided for in s. 2. Then by s. 22 it was provided that the overseers of any parish, if they thought their parish aggrieved by the rate, might appeal "to the justices of the peace for the county" at the next quarter sessions. And the question to be determined by this Court is who are "the justices of the peace for the county" for the purposes of the present case? Outside the metropolis no difficulty can arise with respect to this question, for although the county rate is no longer made by justices, the duty of making such a rate being transferred by s. 3 of the Local Government Act, 1888, along with the other administrative business of quarter sessions, to the county council, the areas of the county for administrative and for judicial purposes are the same, and the quarter sessions to which the appeal against a county rate lies is the quarter sessions of the county whose council made the rate. In the metropolis, however, it is otherwise. There the areas of the county of London for administrative and non-administrative or judicial purposes are not coterminous. (1) The administrative county

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ship or place . . . . where there is no churchwarden or overseer . . . . shall at any time thereafter have reason to think that such parish, township or place is aggrieved by any rate or assessment now existing or hereafter to be made upon the basis or standard hereinbefore mentioned . . . . whether it be on account of the proportions assessed upon the respective parishes, townships or places being unequal, or on account of some one or more of them being without sufficient cause omitted altogether from the rate, or on account of such parish, township or place being rated at a higher proportion of the pound sterling according to the fair annual value of the rateable property therein . . . . it shall be lawful for such . . . churchwardens . . . . or overseers of the poor or other inhabitants . . . . to appeal to the justices of the peace for the county at the next quarter sessions of the peace after such cause of appeal shall have arisen against such part of the rate only as may affect the parish or parishes, township or townships, place or places which are unequally rated, or which shall appear to be overrated or underrated, or omitted altogether from the rate."

(1) By the Local Government Act, 1888, s. 40, sub-s. (1), "The metropolis shall . . . . be an administrative county for the purposes of this Act by the name of the administrative county of London," the expression "metropolis" being by s. 100 defined to mean "the city of London and the parishes and places mentioned in

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of London, the council of which makes the London county rate, includes the city of London, whereas the non-administrative county of London excludes it, it being provided by s. 40, sub-s. 3, of the Act of 1888 that the City shall for non-administrative purposes continue to be a county in itself with a separate commission of the peace. It will be said on the other side in support of the rule to the county of London justices that as "the justices of the peace for the county" who were to hear appeals under s. 22 of the Act of 1852 were the same justices as those who made the rate under s. 21, and as under that section they could only rate parishes which were "within the limits of their commission," their right to hear appeals must be confined to appeals from parishes within those limits; and that consequently, as the parish of the City of London is outside the limits of the commission of the county of London justices, they cannot hear the present appeal. It may be that that contention is right, and that the rule cannot be successfully opposed. But at any rate it is clear that this appeal does not lie to the city of London justices. For under the City of London (Union of Parishes) Act, 1907, the whole City is now one parish, and the overseers of that parish who are bringing this appeal are the Common Council, who are substantially the same body as the City justices, so that if the appeal is heard by the City justices they will be judges in their own cause. It may possibly be that before the Act of 1907, if the overseers of the particular parish in the City containing the hereditaments exempted from liability to county rates had appealed against the county rate on the ground that the total of the parish included the value of the exempted property, the

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Schedules A, B, and C to the Metropolis Management Act, 1855, as amended by subsequent Acts."

Sub-s. 2: "Such portion of the administrative county of London as forms part of the counties of Middlesex, Surrey, and Kent shall . . . . be severed from those counties and form a separate county for all non-administrative purposes by the name of the county of London; and it shall be lawful for Her Majesty the Queen . . . . to grant a commission of the peace and Court of quarter sessions to that county."

Sub-s. 3: "Provided that, for the purpose of the jurisdiction of the justices under such commission, and of such Court, as well as other non-administrative purposes, the county of the city of London shall continue a separate county."

appeal would have lain to the City quarter sessions, because the rate would have been unfair as between that parish and the other parishes in the City. But now that the various parishes are united into one the appeal cannot lie to the City quarter sessions, for that sessions cannot have jurisdiction to decide whether the total for the whole City is fair as against the other parishes in the county of London. Moreover the definition of the word "county" in s. 51 of the Act of 1852 shews that the city of London is not a county within the meaning of s. 22 of that Act. By s. 51, "In the construction of this Act the word 'county' shall mean and include any . . . . place in which rates in the nature of county rates may be levied, having a separate commission of the peace, and not subject to the jurisdiction of the county or counties at large . . . . in which such . . . . place may lie, nor contributing or paying to the county rates made for such county or counties at large." The City is indeed a place having a separate commission of the peace, but it contributes to the county rates made for the county of London at large. If the appellants are right in saying that this appeal lies to the city of London sessions, then, as the inequality complained of would affect the whole rate, the whole rate made for the administrative county might be quashed on an appeal brought to that sessions; a result which can never have been intended. If then this view with regard to the jurisdiction of both the Courts of quarter sessions is right, it follows that there is no appeal at all against a county rate in respect of land situate in the city of London. It may be that that conclusion is the correct one, and that the Legislature per incuriam omitted to provide for the difficulty. But even if that is so, no hardship is involved thereby in such a case as the present, for the appeal here is against the total. The appellants complain that the figure 5,631,340*l.* is too high, and that is in substance a complaint against the valuation list. But for that they had a right of appeal, had they chosen to use it within the time limited, to the London county sessions as the successor of the old assessment sessions by virtue of the provisions of s. 42, sub-s. 10, of the Local Government Act, 1888. It is submitted that that was the appellants' only remedy (a remedy which in

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view of the lapse of time is not now open to them), and that there is no appeal against the rate. But if that view is wrong and there is a right of appeal against the rate to some Court, it must be to the county of London sessions and not to the city of London sessions.

Danckwerts, K.C., *Ryde, K.C.*, and *Boydell Houghton*, for Mr. Stanley in support of the first rule, and for the overseers of the city of London shewing cause against the second. The rate appealed from is bad so far as it affects the amount of the City's contribution, for that amount is based upon the inclusion of properties which are exempt from county rate under the statute of George III. No doubt it has been held that the words of exemption in that Act "free from all taxes and assessments whatsoever" apply only to rates which were in existence in 1766, the date of the passing of that Act, but, whether the county rate in its present form was in existence at that date or not, the poor rate at all events was in existence then, and by s. 26 of the County Rates Act, 1852, the justices who make the rate are to issue their precepts to the guardians of the several unions to "raise the monies required by such precepts to be paid in like manner as the money required by such guardians for the relief of the poor." Moreover by s. 21 the rate is to be made by the justices upon the basis or standard provided for by the preceding sections of the Act, which basis or standard is to be the "full and fair annual value of the property . . . . rateable to the relief of the poor." It is true that that basis, in the sense of a valuation list made by the justices of the county, is now gone so far as the metropolis is concerned, ss. 1—20 of the Act of 1852 being repealed by s. 77 of the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), and the general valuation list which was the subject of that Act being by s. 45 made conclusive of the gross and rateable value of the hereditaments included in it for the purpose of, amongst other rates, the county rate. But that substitution of the general valuation list for the old county basis does not enlarge the class of hereditaments on which the county rate is to be levied, for by s. 54 nothing in the Act is to "affect any exemption or deduction from or allowance out of any rate or tax whatever."

As then the city of London is in this rate charged too large a sum, it must have a right of appeal, and it is contended that that appeal lies to the city of London sessions. It cannot lie to the county of London sessions for this reason: justices derive from their commission of the peace no civil jurisdiction whatever; any civil jurisdiction which they have must be derived from some statute, and there is no statute giving the justices of the county of London power to hear appeals against rates charged on land situate in the City. Under the Act of 1852 the justices' jurisdiction to hear appeals is confined to cases in which the locus lies "within the limits of their commissions," which land situate in the City admittedly does not. The Local Government Act, 1888, gives them no such power. By s. 42, sub-s. 10, the jurisdiction of the assessment sessions under the Valuation (Metropolis) Act, 1869, was transferred to the quarter sessions of the county of London, but that only gave them power to hear appeals against the valuation list, not against the rate. The Act of 1869 had nothing to do with the rate, but only with the valuation list upon which the rate was based. Before the Act of 1888 the city of London made its own county rate and spent it itself; it did not contribute to the county rate for the county of Middlesex; and by sub-s. 13 of s. 42 of the Act of 1888, "Nothing in this Act shall alter the powers or duties of the . . . . quarter sessions . . . . of the city of London further or otherwise than is expressly provided," and there is no express provision taking away its jurisdiction in the matter of appeals. Though s. 40, sub-s. 1, of that Act created for administrative purposes a new county of London which was to include the City, sub-s. 3 expressly provided that "for the purpose of the jurisdiction of the justices . . . . the county of the city of London shall continue a separate county." The jurisdiction then of the City justices to have such an appeal as the present remains unaltered by that Act. Nor can it be regarded as affected by the City of London (Union of Parishes) Act, 1907. That was a private Act designed to facilitate the business of local government within the City, and it cannot have been intended thereby to transfer the jurisdiction of the City justices to another body. The objection that if the appeal

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lies to the city of London sessions the appellants will be judges in their own cause is not accurate, for the Common Council and the quarter sessions are not the same body. The former consists of the mayor, aldermen, and citizens assembled in common council; the latter of the mayor, recorder, and aldermen. But even if they are substantially the same body so that the appellants' claim is open to the objection made, the answer is that the Legislature has chosen so to enact. It cannot be, as suggested on the other side, that there is no appeal at all. There was one before the Act of 1888, and presumably there must be one still. In order to get over the difficulty of the hardship which would be entailed on the supposition that there was no appeal, it was suggested that the appellants' complaint was against the City's total in the valuation list, and that they might have appealed against the valuation list to the quarter sessions for the county of London as the successor of the assessment sessions. But that is to misconceive the appellants' complaint. They do not object to the total. The total, or rather the totals,—for there are two, one excluding the exempted hereditaments and the other including them,—are perfectly correct. The appellants could not have been heard to complain against the larger one of 5,631,340*l.*, for it has been held by the Court of Appeal in *Rex* v. *City of London Assessment Committee* (1) that the assessment committee are bound to insert in the valuation list both the gross and rateable values of properties exempted under the statute of George III., because there are various rates from which those properties are not exempt, and the valuation list is the sole authorized record of their value. And the smaller total of 5,601,928*l.* is that on which the appellants say the rate ought to have been made. Both totals are correct, but the county council made the rate upon the wrong one. The contention that the appeal cannot lie to the City justices because the whole rate would be upset if the appeal succeeded is ill founded. The appeal section of the Act of 1852, s. 22, expressly provides that the appeal shall be brought "against such part of the rate only as may affect the parish . . . . which shall appear to be overrated." The effect of the appeal if successful will not be to disturb the rates in the other

(1) [1907] 2 K. B. 764.

parishes in the county, but only to reduce the amount of the city of London's contribution, and cause the ratepayers in the City who are liable to this rate to pay no more than the 1*s.* 6*d.* in the pound which is charged by the rate upon the other ratepayers throughout the county.

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Cur. adv. vult.

May 16. The judgment of the COURT (Lord Alverstone C.J., Pickford and Avory JJ.) was delivered by

AVORY J. These are two rules for prohibition, one directed to the city of London quarter sessions at the instance of the London County Council, and the other directed to the county of London quarter sessions at the instance of a ratepayer of the city of London, to prohibit them respectively from hearing an appeal by the Common Council of the city of London against a county rate made by the London County Council for the administrative county of London, which includes the city of London.

The county rate in question is made under the County Rates Act, 1852 (15 & 16 Vict. c. 81), and by the operation of s. 3, sub-s. (i.), and s. 40 of the Local Government Act, 1888, the power and duty of making, assessing, and levying such rate in the county of London are transferred to the London County Council. The question now raised for decision is, to which of these Courts of quarter sessions the said appeal lies.

The right of appeal against the basis or standard of the rate and against the rate or assessment itself is conferred by ss. 17 and 22 of the County Rates Act, which provide that such appeal shall be to the quarter sessions of the county by whom the rate or assessment was made, or the basis or standard of the rate was fixed, and if the question had to be decided on the construction of the County Rates Act alone it would appear reasonable to hold that such appeal is now properly brought to the county of London quarter sessions, but for the determination of this question it is necessary also to consider the real nature of this appeal having regard to the provisions of the Valuation (Metropolis) Act, 1869, which applies to the whole of the metropolis including the city of London. By s. 45 of the last-mentioned

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Act the valuation lists for the time being in force in the several parishes in the metropolis are conclusive for the purpose of the county rate and sums assessed on any part of the metropolis by the Metropolitan Board of Works (now the London County Council) and every other contribution required in the metropolis on the basis of value, "and in construing the County Rate Act and Acts referring to the valuation estimate basis or standard for the county rate, the valuation estimate basis or standard shall be deemed to be the rateable value stated in such list." The rate or assessment in question is based on the total of the valuation list for the parish of the city of London (now one parish under the provisions of the City of London (Union of Parishes) Act, 1907) and is collected by means of a precept issued by the London County Council to the Common Council of the city of London as overseers of the parish, and it appears by the affidavits of the City solicitor and the town clerk and by the admission of counsel for the appellants that the real grievance and ground of appeal, apart from the form of the notice of appeal, is that the total of the rateable value upon which the precept is calculated is too high by reason of certain exempted properties being included in such total. This appeal, therefore, is against the total in the valuation list, and *Rex* v. *City of London Assessment Committee* (1) decides that the Corporation of the City of London can appeal against the total of the valuation list under s. 32 of the Valuation (Metropolis) Act, 1869, on the ground that it is too high or too low by reason of the exempted properties being included or excluded in such total, and such appeal would beyond dispute be to the quarter sessions for the county of London, which Court by s. 42, sub-s. 10, of the Local Government Act, 1888, has taken the place of the assessment sessions under the Act of 1869. Before the Act of 1888 the only Court that could entertain such an appeal was the assessment sessions constituted under ss. 23 and 24 of the Valuation (Metropolis) Act, 1869. Such an appeal could never have been entertained by the city of London quarter sessions, and there is nothing in the Act of 1888 to give them jurisdiction, and the fact that the provision in s. 42, sub-s. 10, of the Local

(1) [1907] 2 K. B. 764.

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Government Act, 1888, which was inserted to safeguard the interests of the city of London in any matter especially affecting them, has been repealed by the City of London (Union of Parishes) Act, 1907, cannot confer it.

The result in our opinion is that the rule for the prohibition to the city of London quarter sessions must be made absolute, and the rule for the prohibition to the county of London quarter sessions discharged.

Rule in Rex v. *Justices of County of London discharged.*

Rule in Rex v. *Justices of City of London made absolute.*

Solicitor for the London County Council: *E. Tanner.*

Solicitors for Mr. Stanley: *White & Leonard.*

Solicitor for the overseers of the city of London: *The City Solicitor.*

J. F. C.

THE KING *v.* THE JUSTICES OF THE SALFORD HUNDRED DIVISION OF THE COUNTY OF LANCASTER.

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Licensing Acts—Costs—Appeal against Refusal to renew Licence—Case stated by Quarter Sessions—Appeal allowed by High Court with Costs against Licensing Justices—Power to order Indemnity out of Local Funds—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 & 1 *Geo.* 5, *c.* 24), *s.* 32.

By s. 32 of the Licensing (Consolidation) Act, 1910, "Where an appeal under this Act is allowed, or where any such appeal is dismissed or abandoned and the licensing justices whose decision is appealed against cannot recover the costs incurred by them from any other person, the Court of quarter sessions shall order the treasurer of the county . . . . or, in the case of a licensing district being a borough having a separate Court of quarter sessions, the treasurer of the borough, to pay to the justices such sum as in the opinion of the Court is sufficient to indemnify them from all costs and charges whatsoever to which they may have been put."

Upon an appeal against the refusal of licensing justices to renew a licence the quarter sessions dismissed the appeal subject to a special case for the opinion of the High Court. The licensing justices, who were the respondents, did not appear upon the argument of the case, and the High Court allowed the appeal and ordered the respondent

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justices to pay to the appellant the costs of the appeal to that Court on the special case:—

Held, that these were costs to which the licensing justices had been put within the meaning of s. 32 of the Licensing (Consolidation) Act, 1910, and that the licensing justices were therefore entitled to an order of quarter sessions upon the treasurer under that section to pay to them the amount thereof.

RULE to shew cause why a writ of mandamus should not issue directed to the justices in and for the Salford Hundred Division of the county of Lancaster commanding them or some of them to make an order upon the treasurer of the county borough of Bolton under s. 32 of the Licensing (Consolidation) Act, 1910 (1), to pay the costs of an appeal to the King's Bench Division of the High Court of Justice by way of a special case, wherein James Lawson Cooke and the Manchester Brewery Company, Limited, were the appellants and the present prosecutors, five of the justices of the peace in and for the county borough of Bolton, were the respondents, which said costs were taxed and allowed at the sum of 58*l*. 19*s*. 6*d*., and any other costs to which the prosecutors had been put and had not received from the

(1) 10 Edw. 7 & 1 Geo. 5, c. 24, s. 31: "(1.) Where an appeal is dismissed or abandoned, the Court of quarter sessions shall order the appellant to pay to the justices against whose decision he has appealed, or such person as they appoint, such sum by way of costs as is in the opinion of the Court sufficient to indemnify those justices from all costs and charges whatsoever to which they have been put in consequence of his having served notice of his intention to appeal . . . ."

Sect. 32: "(1.) Where an appeal under this Act is allowed, or where any such appeal is dismissed or abandoned and the licensing justices whose decision is appealed against cannot recover the costs incurred by them from any other person, the Court of quarter sessions shall order the treasurer of the county in which the licensing district for which the licensing justices act is situated, or, in the case of a licensing district being a borough having a separate Court of quarter sessions, the treasurer of the borough, to pay to the justices such sum as in the opinion of the Court is sufficient to indemnify them from all costs and charges whatsoever to which they may have been put, and that treasurer is hereby authorised to pay the sum so ordered to be paid, and any sum so paid shall be allowed to him in his accounts.

"(2.) An order of a Court of quarter sessions under this section may be made either at the sessions at which the appeal is heard, or at the next ensuing sessions, and the costs may be taxed either in or out of sessions."

said appellants, on the ground that the costs of the proceedings before the King's Bench Division were costs to which the prosecutors had been put within the meaning of s. 32.

At the general annual licensing meeting for the county borough of Bolton in February, 1911, the justices refused to renew to the above-named J. L. Cooke a licence for the sale of intoxicating liquor at the Central Hotel. On February 11 Cooke and the Manchester Brewery Company, who were the owners of the premises, gave notice of appeal against the refusal to the quarter sessions for the Salford Hundred Division of the county of Lancaster. Cooke died on February 19, 1911, after service of the notice of appeal and before the hearing of the appeal, and on February 25 his widow applied to the borough justices for a temporary transfer to her of the licence pending the hearing of the appeal, which was refused. A rule nisi was granted for a mandamus to the justices to hear and determine the application according to law, and this rule was pending when the appeal came on for hearing before the quarter sessions on April 10, 1911.

On March 11, 1911, letters of administration of Cooke's estate were granted to his widow.

Upon the hearing of the appeal it was objected by counsel for the respondents, the justices for the borough of Bolton, that by reason of Cooke's death the licence had become extinct, and that therefore no appeal lay from the refusal to renew the licence, and that the owners had no right of appeal as they were not persons aggrieved within s. 29 of the Licensing (Consolidation) Act, 1910. The Court of quarter sessions upheld the objection and dismissed the appeal subject to a special case for the opinion of the King's Bench Division. Upon the hearing of the special case the respondents, the justices for the borough of Bolton, did not appear, and the King's Bench Division reversed the order of quarter sessions, holding that the widow of the licence-holder and the brewery company were entitled to maintain the appeal, and remitted the matter to the quarter sessions for rehearing and determination (1); and ordered the respondent justices to pay to the appellants the costs of the appeal to that Court. Those costs were subsequently taxed at 58*l.* 19*s.* 6d.

(1) The case is reported sub nom. *Cooke* v. *Cooper*, ante, p. 248.

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The appeal was reheard by quarter sessions on January 8, 1912, when the appeal against the refusal to renew the licence was dismissed with costs, and the question as to making an order on the treasurer of the borough of Bolton, which was a county borough having a separate Court of quarter sessions, for payment of the above-mentioned sum of 58*l.* 19*s.* 6*d.* stood over for decision until April 15, 1912. Accordingly on April 15 an application was made to the quarter sessions for an order on the treasurer of the borough for the payment of the sum of 58*l.* 19*s.* 6*d.*, but the Court declined to make any order upon the ground that they had no jurisdiction to do so.

Rigby Swift, for the justices of the Salford Hundred Division, shewed cause. The Court has no power to make the order asked for. There is no lis and there are no parties when the matter is before the licensing justices: *Boulter* v. *Kent Justices* (1); and this applies to an appeal: *Reg.* v. *Staffordshire Justices.* (2) The costs of licensing appeals are regulated by ss. 31 and 32 of the Licensing (Consolidation) Act, 1910, and there is no power to award costs apart from those sections. Those sections now take the place of s. 29 of the Alehouse Act, 1828 (9 Geo. 4, c. 61), and s. 20 of the Licensing Act, 1902 (2 Edw. 7, c. 28). The notice of intention to appeal has to be given to the clerk of the licensing justices (s. 29); and they may appear and oppose the appeal, and the quarter sessions have no power to order them to pay costs to the appellant in the event of the appeal being successful: *Reg.* v. *London Justices* (3); *Reg.* v. *Staffordshire Justices.* (4) Sect. 31 of the Act of 1910 deals with the case where the appeal is dismissed or abandoned, and in such a case the quarter sessions shall order the appellant to pay to the justices against whose decision he has appealed such sum by way of costs as shall indemnify them from all costs and charges whatsoever to which they have been put in consequence of his having served notice of his intention to appeal. Then s. 32 deals with the case where the appeal is allowed, or where the appeal is dismissed or abandoned and the licensing justices whose decision is appealed

(1) [1897] A. C. 556, at p. 569.
(2) [1898] 2 Q. B. 231, at p. 235.
(3) (1898) 62 J. P. 517.
(4) [1898] 2 Q. B. 231.

against cannot recover the costs incurred by them from any other person, and in either of these cases the quarter sessions shall order the treasurer of the county or the treasurer of the borough having a separate Court of quarter sessions, as the case may be, to pay to the justices such sum as is sufficient to indemnify them from all costs and charges whatsoever to which they may have been put. The costs referred to in both those sections are the costs of the appeal to quarter sessions. The costs of the hearing of a special case stated by quarter sessions upon the appeal to them are not costs of the appeal to quarter sessions. When the case is before the quarter sessions the licensing justices are fulfilling a public duty in appearing upon the appeal, and are not in any sense parties, and the above sections provide for their costs in so appearing. But a special case stated by quarter sessions is no part of the appeal to quarter sessions. It is an independent appeal from the quarter sessions to the High Court: s. 2 of the Supreme Court of Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16); *Kydd* v. *Liverpool Watch Committee* (1), which is not affected upon this point by the reversal of the judgment in the House of Lords. (2) The nature and origin of the procedure by way of special case stated by quarter sessions are stated in *Reg.* v. *Chantrell* (3) and *Walsall Overseers* v. *London and North Western Ry. Co.* (4) The words in s. 32 of the Act of 1910, "all costs and charges whatsoever to which they may have been put," refer to the costs of "an appeal under this Act," that is to say, an appeal to quarter sessions, and not an appeal from quarter sessions. If the special case were part of the appeal to quarter sessions, the High Court would have no power to make an order as to costs, such costs being regulated by ss. 31 and 32 of the Licensing (Consolidation) Act, 1910. In *Reg.* v. *Staffordshire Justices* (5) no doubt the costs of rules for a certiorari and mandamus were ordered by the High Court to be included in the indemnity order which the quarter sessions had made in respect of the costs of the original appea

(1) [1907] 2 K. B. 591, at pp. 604, 605.
(2) [1908] A. C. 327.
(3) (1875) L. R. 10 Q. B. 587.
(4) (1878) 4 App. Cas. 30, at p. 40.
(5) Reported upon this point in 79 L. T. 142, at p. 145; 62 J. P. 741, at p. 743.

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to quarter sessions, but in that case the quarter sessions refused to include those costs in the indemnity order upon the ground that the costs must first be allowed by the High Court, and by consent it was agreed that the issuing of the indemnity order should stand over until an application was made to the High Court. It was a consent order, and the point was not argued; but if anything was decided upon the application it was that the High Court and not the quarter sessions had power to order the costs to be included in the indemnity order. The present application is for a mandamus to the quarter sessions to include the costs of the special case in their indemnity order, which the quarter sessions have no power to do.

Next, even if the costs of the special case are costs in the appeal to quarter sessions, these costs which the licensing justices desire to have included in the indemnity order under s. 32 are the costs of the successful licensee which the justices have paid under the order of this Court, and s. 32 does not apply to such costs. Notwithstanding the wide words of s. 29, sub-s. 4, of the Licensing (Consolidation) Act, 1910, there is no power to give a successful licensee his costs of an appeal against licensing justices: *Reg.* v. *London Justices* (1); *Reg.* v. *Staffordshire Justices* (2); and that being so, there is no power to order these costs to be paid out of local funds. The quarter sessions were therefore right, and the rule for a mandamus should be discharged.

Sanderson, K.C. (*R. M. Montgomery* with him), in support of the rule. Sect. 32 of the Licensing (Consolidation) Act, 1910, applies to these costs, and the Court of quarter sessions is bound to order the treasurer of the borough to pay the amount thereof to the licensing justices. That section deals with the case where the appeal is allowed, or where, though the appeal is dismissed or abandoned, the licensing justices cannot recover the costs incurred by them from any other person, and in either case the Court of quarter sessions shall order the treasurer of the county or borough, as the case may be, to pay to the justices "such sum as in the opinion of the Court is sufficient to indemnify them from all costs and charges whatsoever to which they may

(1) 62 J. P. 517. (2) [1898] 2 Q. B. 231.

have been put." These latter words are as wide as possible so as to include all costs and charges to which the licensing justices have been put even though they may not strictly be costs in the appeal to quarter sessions. The limitation in s. 31, "in consequence of his having served notice of his intention to appeal," is omitted in s. 32. The intention is that the licensing justices shall have a complete indemnity, as it would be unfair that licensing justices, who act in a public capacity, should be made to pay costs personally. In truth the statement by quarter sessions of a case for the opinion of the High Court is a step in the appeal to quarter sessions. It is an incident in that appeal. There is nothing in the judgment of the Court of Appeal in *Kydd v. Liverpool Watch Committee* (1) contrary to that view. Fletcher Moulton L.J. (2) in that case, speaking of the nature and origin of the procedure by special case stated by quarter sessions for the opinion of the Court, said that the decisions in *Reg. v. Chantrell* (3) and *Walsall Overseers v. London and North Western Ry. Co.* (4) shewed clearly that the procedure was not in the nature of an appeal, although in effect it was analogous thereto. It was founded on the consultative jurisdiction of the quarter sessions. Even if there is anything in the reasoning in that case inconsistent with the view that the procedure is not an independent appeal, but part of or an incident of the appeal to quarter sessions, reliance cannot safely be placed upon that reasoning because of the reversal of the decision in the House of Lords. (5) But whether or not the procedure by case stated is part of or an incident of the appeal to quarter sessions, the words of s. 32 are wide enough to cover this case.

Further, the point is concluded by the order of this Court in *Reg. v. Staffordshire Justices.* (6) It was there decided that the Court of quarter sessions had power to include the costs of the licensing justices upon the rules for a certiorari and mandamus in the order for indemnity. The present is a stronger case. An application for a certiorari or mandamus is an independent

(1) [1907] 2 K. B. 591.
(2) Ibid. at p. 603.
(3) L. R. 10 Q. B. 587.
(4) 4 App. Cas. 30.
(5) [1908] A. C. 327.
(6) 79 L. T. 142, at p. 145; 62 J. P. 741, at p. 743.

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application, asking the Court to interfere with the action of the quarter sessions, and is not in any way a step in the appeal to quarter sessions, whereas a case stated by quarter sessions is, the title of the case being the same as in the appeal.

LORD ALVERSTONE C.J. This rule must be made absolute. Before I deal with the merits of the case I desire to point out that the origin of the difficulty is the order which this Court made upon the hearing of the special case in *Cooke* v. *Cooper* (1) that the justices for the borough of Bolton, who were the respondents, should pay the costs of the special case. The justices did not appear to argue the special case, and in ordinary circumstances we do not in such a case give costs against justices. I cannot now remember why we made that order. The cases of *Reg.* v. *London Justices* (2) and *Reg.* v. *Staffordshire Justices* (3) were not cited to us, and the only possible reason I can think of is that the justices raised the point before the Court of quarter sessions which led to the case being stated, and that therefore, acting under s. 2, sub-s. 3, of the Supreme Court of Judicature (Procedure) Act, 1894, we gave costs against them. I wish to guard against that case being referred to as an authority that this Court will in such a case give to a successful licensee as against justices the costs of a special case stated by quarter sessions in a licensing appeal.

The question which we have to determine is whether the licensing justices are entitled to an order at quarter sessions upon the treasurer of the borough of Bolton under s. 32 of the Licensing (Consolidation) Act, 1910, to pay the costs of the special case which this Court ordered the licensing justices to pay, and which have been taxed at 58*l.* 19*s.* 6*d.*, and any other costs to which the justices have been put. Sects. 31 and 32 of the Act of 1910 have not made any alteration in the law relating to this matter. It seems to me that the combined effect of s. 29 of the Alehouse Act, 1828, and s. 20 of the Licensing Act, 1902, which have been repealed, is now to be found in ss. 31 and 32 of the Act of 1910. The effect of those sections is

(1) Ante, p. 248. (2) 62 J. P. 517.
(3) [1898] 2 Q. B. 231.

to give the licensing justices a complete indemnity. Sect. 32 is the material section in this case. That section provides that "Where an appeal under this Act is allowed, or where any such appeal is dismissed or abandoned and the licensing justices whose decision is appealed against cannot recover the costs incurred by them from any other person, the Court of quarter sessions shall order the treasurer of the county in which the licensing district for which the licensing justices act is situated, or, in the case of a licensing district being a borough having a separate Court of quarter sessions, the treasurer of the borough, to pay to the justices such sum as in the opinion of the Court is sufficient to indemnify them from all costs and charges whatsoever to which they may have been put." It is not denied that the justices have been put to these costs under an order of this Court which they were bound to obey, and, therefore, in my opinion these costs come within the comprehensive language of the section. There is authority for that conclusion in the case of *Reg.* v. *Staffordshire Justices.* (1) In that case there was an appeal to quarter sessions against the refusal by licensing justices to renew a licence, and the licensing justices appeared and opposed the appeal. The quarter sessions allowed the appeal and ordered the licensing justices to pay the costs, and refused them an indemnity under s. 29 of the Alehouse Act, 1828. The licensing justices obtained a rule for a certiorari to quash the order so far as it related to the costs and a rule for a mandamus to hear and determine the application for an indemnity, and a Divisional Court consisting of Wills and Channell JJ. made the rules absolute. (2) Some two months after that decision an application was made on behalf of the licensing justices to a Divisional Court consisting of Wright and Bigham JJ. for an order that the costs of the rules for a certiorari and mandamus should be included in the indemnity, and the Court made the order. (1) That is an authority directly in point. In my opinion the costs of a special case stated by quarter sessions in an appeal to them are more in the nature of costs in the appeal than the costs of a certiorari or mandamus

(1) 79 L. T. 142, at p. 145; 62 J. P. 741, at p. 743.

(2) [1898] 2 Q. B. 231; 79 L. T. 142; 62 J. P. 741

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Lord Alverstone C.J.

are, and they certainly come within the language of s. 32 of the Licensing (Consolidation) Act, 1910, as being costs to which the licensing justices have been put. We cannot decide this case against the justices without saying that the costs of a special case stand in a different position in this respect from the costs of an application for a certiorari or mandamus. It seems to me that there is a good deal to be said for the proposition that a special case stated by quarter sessions is a step in the appeal to quarter sessions. It is stated at the request of one of the parties, and this Court may make an order dismissing or allowing the appeal or it may remit the matter for further hearing. In the present case the matter was remitted to the quarter sessions to be heard upon the merits, and in the result the quarter sessions dismissed the appeal and affirmed the decision of the licensing justices refusing the renewal of the licence. It is therefore a case in which it is most proper that the licensing justices should be repaid the costs to which they have been put. Sect. 2, sub-s. 1, of the Supreme Court of Judicature (Procedure) Act, 1894, is not against the view I am now expressing; it merely provides that "every case stated by a Court of quarter sessions otherwise than under the Acts, 11 & 12 Vict. c. 78 and 12 & 13 Vict. c. 45, for the consideration of the High Court shall be deemed to be an appeal and shall be heard and determined accordingly." That means that it is to be heard and determined as an appeal usually is heard and determined. The section does not indicate that a special case is not a step in the appeal to quarter sessions, nor do I find anything in *Kydd* v. *Liverpool Watch Committee* (1) or in any of the other cases which have been referred to which would lead me to take a different view. My present opinion is that a special case is really an incident in the appeal. It is not, however, necessary to say whether that is so or not, because the language of s. 32 of the Act of 1910 is very wide indeed, "all costs and charges whatsoever to which they may have been put." Those words might include certain expenses which the justices may have incurred in preparing for the appeal which would not perhaps be strictly costs in the appeal. They seem to me at any rate to include the costs to which the licensing justices

(1) [1907] 2 K. B. 591; [1908] A. C. 327.

have been put by the order of this Court upon the special case, and those costs ought to be ordered to be paid by the borough treasurer.

The rule must therefore be made absolute.

PICKFORD J. I agree with the judgment of my Lord.

AVORY J. I also agree with the judgment of my Lord. I do not think that the distinction which has been pointed out between the language of s. 31 and s. 32 of the Licensing (Consolidation) Act, 1910, assists us in this case. It may possibly be that s. 32, which is the only section we have to consider, is wider than s. 31, but it is not necessary to decide that. The only question in this case is whether the justices, the applicants for this rule, have been put to the costs of the argument of the special case. Whether the special case is treated as a step in or part of the appeal or not I cannot doubt that they have in fact been put by the order of this Court to the costs of the argument of the special case during the pendency of the appeal to quarter sessions. That is sufficient to decide this case.

Upon the question as to the costs of the rule,

LORD ALVERSTONE C.J. We direct that the costs of the borough justices upon this rule shall be taxed and included in the order to be made on the borough treasurer. (1)

Rule absolute.

Solicitors shewing cause: *Snow, Fox & Higginson, for Harcourt E. Clare, Preston.*

Solicitors in support of the rule: *Indermaur & Brown, for R. Winder, Bolton.*

W. F. B.

(1) The order of the Court as drawn up was as follows (omitting formal parts):—"It is ordered that a writ of mandamus do issue directed to the keeper of the peace and justices in and for the Salford Hundred Division of the county of Lancaster commanding them or some of them to make an order upon the treasurer of the county borough of Bolton, in the county of Lancaster, under section 32 of the Licensing (Consolidation) Act, 1910, to pay the costs of a certain appeal to this Court by way of a special case wherein James Lawson Cooke and the Manchester Brewery Company Limited were appellants

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April 30.

THE KING *v.* THE GOVERNOR OF BRIXTON PRISON. THE KING *v.* THE GOVERNOR OF HOLLOWAY PRISON.

Extradition—Requisition for Surrender—Arrest of Accused—Requisition by "the diplomatic agent of his country"—Extradition Treaty of 1876 *with France, art.* 9.

By art. 9 of the Extradition Treaty of 1876 between the United Kingdom and France a fugitive criminal may be apprehended under a warrant issued by a magistrate on such information or complaint and such evidence or after such proceedings as would, in the opinion of the person issuing the warrant, justify the issue of a warrant if the crime had been committed where the magistrate exercises jurisdiction; and the accused "shall be discharged, as well in the United Kingdom as in France, if within fourteen days a requisition shall not have been made for his surrender by the diplomatic agent of his country." Under the Extradition Treaty of 1908 each country may allow the extradition of its own nationals.

In proceedings under art. 9 of the treaty of 1876 to obtain the extradition of a British subject charged with having committed a crime in France, it was objected that no requisition had been made for his surrender by the diplomatic agent of the United Kingdom:—

Held, that "the diplomatic agent of his country" meant the diplomatic agent of the country within whose jurisdiction the accused was when he committed the crime charged against him and which demanded his extradition, and that therefore a requisition for his surrender by the diplomatic agent of this country was not necessary.

Two rules nisi for writs of habeas corpus.

The first was a rule for a writ of habeas corpus directed to the governor of Brixton Prison to bring up, for the purpose of his release, the body of Charles de Ville Wells, who had been arrested under a warrant issued by a metropolitan police magistrate and committed to prison with a view to his extradition to France.

The prisoner was a British subject, and the magistrate had committed him to await extradition on charges of the following crimes alleged to have been committed in France:—Obtaining

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and the prosecutors herein respondents, which said costs were taxed and allowed at the sum of 58*l.* 19*s.* 6*d.*, and any other costs to which the said prosecutors have been put and have not received from the said appellants, including the costs of and occasioned by this motion and of the issuing of the said writ of mandamus and consequent thereon, such last mentioned costs to be taxed by one of the taxing Masters."

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money by false pretences (escroquerie), fraud by a bailee (abus de confiance), and fraudulent bankruptcy (banqueroute frauduleuse). These offences are included in those enumerated in the Extradition Treaty of 1876 between the United Kingdom and France. The prisoner was arrested on January 20, 1912, under a warrant issued upon the application of a representative of the French ambassador in London, under art. 9 of the Extradition Treaty of 1876, upon telegraphic instructions received from the French Foreign Office, and within fourteen days a requisition was made for his surrender by the French ambassador in London. On March 20 the prisoner was committed to prison to await extradition, and on March 26 the above rule was obtained upon the ground (so far as material to this report) that no requisition for the surrender of the prisoner had been made within fourteen days after his arrest "by the diplomatic agent of his country," that is to say, the diplomatic agent of the British Government, within the meaning of art. 9 of the treaty. (1) It

(1) By the Extradition Treaty of August 14, 1876 (ratified on April 8, 1878), between the United Kingdom and France, art. 2, "Native-born or naturalised subjects of either country are excepted from extradition . . . ."

Art. 9: "A fugitive criminal may be apprehended under a warrant issued by any police magistrate, justice of the peace, or other competent authority in either country, on such information or complaint, and such evidence, or after such proceedings as would, in the opinion of the person issuing the warrant, justify the issue of a warrant if the crime had been committed or the prisoner convicted in that part of the dominions of the two contracting parties in which the magistrate exercises jurisdiction: provided however that in the United Kingdom the accused shall, in such case, be sent as speedily as possible before a magistrate. He shall be discharged, as well in the United Kingdom as in France, if within fourteen days a requisition shall not have been made for his surrender by the diplomatic agent of his country in the manner directed by articles 2 and 4 of this treaty . . . ."

By the Extradition Treaty of October 17, 1908 (ratified on July 29, 1909), between the United Kingdom and France, art. 1, "Article 2 of the extradition treaty of August 14, 1876, is modified as follows:

"'Each of the two High Contracting Parties shall be at liberty to refuse to the other the extradition of its own nationals. In the case however of a person who, since the commission of the crime or offence of which he is accused, or for which he has been convicted, has become naturalized in the country where the surrender is sought, such naturalization shall not prevent the pursuit, arrest, and extradition of such person in conformity with the stipulations of the present treaty.'"

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was admitted that no application for his surrender had been made by the British Government or by any diplomatic agent thereof.

The second was a rule for a writ of habeas corpus directed to the governor of Holloway Prison to bring up, for the purpose of her release, the body of Jeannette Burns, who had been arrested under a warrant issued by a metropolitan police magistrate under art. 9 of the treaty of 1876, and committed to prison with a view to her extradition to France. The prisoner was arrested on the same day as the prisoner Wells upon charges of complicity in and aiding and abetting the commission of the offences alleged to have been committed by Wells, and the same point was raised in this case.

Sir J. A. Simon, S.-G. (*S. A. T. Rowlatt* with him), shewed cause. Under art. 2 of the treaty of 1876 between Great Britain and France the nationals of either country were excepted from extradition. This was altered by art. 1 of the treaty of 1908, under which each country "shall be at liberty to refuse to the other the extradition of its own nationals." This renders it discretionary for either country to allow extradition of its own subjects. Under ss. 7 and 8 of the Extradition Act, 1870 (33 & 34 Vict. c. 52), there are two alternative methods provided for the surrender of a fugitive criminal, namely, either by a requisition for his surrender by the diplomatic agent of the foreign State to a Secretary of State in this country, who then, by an order under his hand, signifies to a police magistrate that such requisition has been made and requires him to issue a warrant for the apprehension of the fugitive criminal; or, without a requisition to and order of the Secretary of State, by the issue of a warrant by a police magistrate or any justice of the peace on such information or complaint and such evidence or after such proceedings as would, in the opinion of the person issuing the warrant, justify the issue of a warrant if the crime had been committed in the United Kingdom, and in this case the fugitive criminal shall be discharged unless the magistrate receives from a Secretary of State, within such time as he shall fix, an order signifying that a requisition has been made for his surrender. The treaty of 1876 follows the scheme of the Act.

Arts. 6 and 7 follow out the first procedure, and art. 9 follows out the second procedure. The procedure in the present case was under art. 9, which, after providing for the issue of a warrant, declares that the fugitive criminal "shall be discharged, as well in the United Kingdom as in France, if within fourteen days a requisition shall not have been made for his surrender by the diplomatic agent of his country in the manner directed by articles 2 and 4 of this treaty." It is said that the prisoners are entitled to be discharged because no requisition for their surrender was made by the diplomatic agent of the United Kingdom, that is to say, either the British ambassador in Paris or the Secretary of State for Foreign Affairs here. That is not the true meaning of art. 9. The words "diplomatic agent of his country" mean the diplomatic agent of the country where the accused was when he committed the crime and to whose jurisdiction he was then subject. Art. 6 deals with the extradition of an accused person from France to this country for a crime committed here, and art. 7 deals with the converse case. In both those articles "diplomatic agent" clearly means the diplomatic agent of the country where the crime was committed. Art. 9 deals compendiously with the case of a crime committed either in this country or in France, and extradition from this country to France or from France to this country, as the case may be, and "his country" must mean the country, whether the United Kingdom or France, where the crime was committed and whose diplomatic agent demands his surrender. The point raised in this case can only arise where the second procedure above mentioned is adopted. Apart from art. 2 (which has now been amended by art. 1 of the treaty of 1908), the nationality of a fugitive criminal is not material. *Reg.* v. *Ganz* (1) is a direct authority that nationality is not material, and that the same words, "the diplomatic agent of his country," in an article of the treaty between this country and the Netherlands, similar to art. 9 of the treaty now in question, meant the diplomatic agent of the country within whose jurisdiction the prisoner was when he committed the crime. The first article of the French treaty shews that its object is to deliver up

(1) (1882) 9 Q. B. D. 93, at p. 101.

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"persons who are being proceeded against or who have been convicted of a crime committed in the territory of the one party and who shall be found within the territory of the other party." Nationality being immaterial, it would be absurd to construe "the diplomatic agent of his country" in art. 9 as meaning the diplomatic agent of the country of which the accused person was a subject, because if a crime were committed in France by the subject of a third country, and the accused escaped to England, before he could be extradited to France, the diplomatic agent of that third country would have to demand his surrender. Art. 1 of the treaty of 1908 does not affect the construction of art. 9 of the treaty of 1876. The rules ought, therefore, to be discharged.

George Elliott, K.C. (*Clarke Hall* with him), in support of the rules. Under the treaty of 1876, before the amending treaty of 1908 the nationals of each country were exempt from extradition, and therefore "the diplomatic agent of his country" in art. 9 could not then mean, in the case of a French or British subject, the diplomatic agent of the country of his nationality. The only possible construction of those words was that they meant, as was decided in *Reg.* v. *Ganz* (1), the diplomatic agent of the country where the accused committed the crime. Art. 1 of the treaty of 1908 altered art. 2 of the treaty of 1876 by giving each country power to surrender its own nationals. That was a great change in the policy of the two countries, and each country intended that its own subjects should have an additional protection. There is no necessity now for giving to the words of art. 9 of the treaty of 1876, "the diplomatic agent of his country," any other than their natural meaning. "His country" means the country of which the accused is a subject. Therefore before a British subject can be extradited to France there must not only be a requisition for his surrender by the diplomatic agent of France, but also a requisition for his surrender by the British ambassador in Paris or other diplomatic agent in that country or the Secretary of State for Foreign Affairs here or his representative. A British subject is not to be delivered up unless there is that which is equivalent to a certificate of approval by the diplomatic

(1) 9 Q. B. D. 93.

agent of his own country that the case is a proper one for his surrender.

[LORD ALVERSTONE C.J. There is no such protection if the procedure adopted is under arts. 6 or 7.]

There is in such a case a protection given by art. 2 of the treaty of 1908, because each country can refuse to surrender its own subjects. The rules ought, therefore, to be made absolute.

LORD ALVERSTONE C.J. These two rules raise a question under art. 9 of the Extradition Treaty of 1876 made between this country and France. By art. 2 of that treaty the parties thereto agreed that the native-born or naturalized subjects of either country should be excepted from extradition. This was a provision commonly inserted in extradition treaties at that time, though in treaties made at a later time a discretion is given to each country to grant or withhold the surrender of its own subjects. By the treaty of 1908 art. 2 of the treaty of 1876 was modified as follows: "Each of the two High Contracting Parties shall be at liberty to refuse to the other the extradition of its own nationals." The question before us turns upon the following words of art. 9 of the treaty of 1876: "He shall be discharged, as well in the United Kingdom as in France, if within fourteen days a requisition shall not have been made for his surrender by the diplomatic agent of his country." In 1882 there was a decision of this Court in *Reg.* v. *Ganz* (1) upon similar words in the then existing extradition treaty between this country and the Netherlands, and Pollock B. said (2): "The article provides that the prisoner shall be discharged as well in the United Kingdom as in the Netherlands, if within fourteen days a requisition shall not have been made for his surrender by the diplomatic agent of 'his' country. I do not however think that it is any very great stretching of the word 'his' to say that 'his country' means the country within whose jurisdiction he was for the purposes of the criminal law administered there, and also 'his' for the purposes of the treaty." Applying that to the treaty of 1876, it shews that art. 9 does not mean that the requisition for surrender must be made by the diplomatic agent

(1) 9 Q. B. D. 93. (2) Ibid. at p. 101.

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of the country of which the accused is a subject, but by the diplomatic agent of the country demanding extradition. These extradition treaties are not framed in the exact legal language of either country, and therefore it seems to me that the construction placed upon those words in *Reg.* v. *Ganz* (1) is a reasonable construction. Two methods of procedure for obtaining the extradition of an accused person from this country are contemplated by the treaty, one under art. 7 originating in a requisition for the surrender of the accused person made to the Secretary of State for Foreign Affairs by the ambassador or other diplomatic agent of the President of the French Republic, and the other under art. 9 originating in an application for a warrant to a magistrate. It is not disputed that if the procedure was under art. 7 there would be no place for the argument that the requisition for surrender must be made by the diplomatic agent of the accused person's own country. That article does not require such a requisition. The only requisition there specified is that of the diplomatic agent of the country demanding extradition. It is not an unnatural construction of the words "the diplomatic agent of his country" ("l'agent diplomatique de son pays") in art. 9 to say that they mean the diplomatic agent of the country within the jurisdiction of which he was at the time when he committed the crime for which his extradition is demanded. Now that the treaty of 1908 gives each country a discretion to allow or to refuse the extradition of its own nationals there is still no reason for the contention that there must be more than the requisition by the diplomatic agent of the country demanding extradition.

In my opinion, both upon the true construction of art. 9 of the treaty of 1876 and upon the authority of *Reg.* v. *Ganz* (1), there is no necessity for any requisition for the accused person's surrender by the diplomatic agent of the country of which he is a subject; and therefore when under the treaty of 1876 as modified by the treaty of 1908 the extradition of a British subject from the United Kingdom or of a French subject from France is demanded the only requisition for his surrender which is necessary is that of the diplomatic agent of the country

(1) 9 Q. B. D. 93.

demanding extradition. The point therefore fails, and the rules must be discharged. (1)

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PICKFORD and AVORY JJ. agreed.

Rules discharged.

Solicitor shewing cause: *Director of Public Prosecutions.*
Solicitor in support of rules: *Walter Turner.*

W. F. B.

SMEED, DEAN & CO. *v.* PORT OF LONDON AUTHORITY.

1912
May 20.

Port of London—Registration of Craft—Sailing Barge—"All lighters, barges, and other like craft"—Port of London Act, 1908 (8 *Edw.* 7, *c.* 68), *s.* 11, *sub-s.* 2 (*f*) (i.).

A sailing barge is a "lighter, barge, or other like craft" within the meaning of s. 11, sub-s. 2 (*f*) (i.), of the Port of London Act, 1908, and is accordingly prohibited from navigating either wholly or partly within the limits of that Act unless she has been registered by the Port of London Authority.

TRIAL of action before Hamilton J. without a jury.

The action was brought to recover a sum of 1*l.* 0*s.* 9*d.* which had been demanded by the defendants from the plaintiffs under by-law 4 of the Port of London (Registration of River Craft) By-laws, 1910, in respect of the registration by the defendants of the plaintiffs' sailing barge *George*, and paid by the plaintiffs under protest; and also for a declaration that the *George* was not a "lighter, barge, or other like craft" within the meaning of the by-law and was not required to be so registered, or that, if the natural meaning of those words was such as to include the *George*, the by-law was ultra vires. The plaintiffs were brick and cement manufacturers carrying on business at Sittingbourne in Kent. The *George* had for several years traded between Milton on the river Swale and London. The Swale is not within the jurisdiction of the defendants. The *George* was duly

(1) The rules in both the cases were obtained upon other grounds not material to this report and were discharged upon all the grounds.

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registered under the Merchant Shipping Act, 1894, her port of registry being Rochester. Her register tonnage under that Act was 41·45 tons, and her dead weight carrying capacity 110 tons. On the one hand she was a seagoing craft and had made voyages as far up the coast as Harwich. On the other hand she differed from a ship in that she had side boards, and had only about three inches of freeboard, which required her cargo to be battened down. By the above-mentioned by-law it is provided that "Every person shall on applying to the port authority for the registration or for the renewal of the registration of a steam tug, lighter, or barge other than a steam barge or canal barge or canal boat registered by the port authority as such respectively pay to the port authority the sum specified in this by-law, that is to say :—For every lighter, barge, and other like craft for carrying goods, wares, or merchandises . . . . a sum equal to six pence for every ton of the tonnage thereof."

Bailhache, *K.C.*, and *Cranstoun*, for the plaintiffs. The craft in question, being a sailing barge, is not a "lighter, barge, or other like craft" within the meaning of the by-law, but if it is, that by-law is ultra vires. It purports to have been made under the powers given by s. 29 of the Thames Watermen's and Lightermen's Act, 1893 (56 & 57 Vict. c. lxxxi.), the powers of the Watermen's Company under that Act being now transferred to the port authority by s. 11 of the Port of London Act, 1908. The by-law was made for the purpose of carrying into effect the provisions of s. 7 of the Act of 1893, which provides that "No craft shall be worked or navigated within the limits of this Act unless (1.) a certificate relating to such craft shall have been issued in pursuance of this Act and shall for the time being be in force." And by s. 3 the expression "craft" was defined to mean "any lighter, barge, or other like craft for carrying goods within the limits of this Act," a definition which so far as the class of craft is concerned is repeated in s. 11, sub-s. 2 (*f*), of the Port of London Act, 1908, with the addition of "steam tugs." The Act of 1893 was an amendment of the Watermen's and Lightermen's Act, 1859 (22 & 23 Vict. c. cxxxiii.), by s. 66 of which "No barge, lighter, boat, or other like craft for the

carrying of goods, wares, or merchandise shall be worked or navigated within the limits of this Act unless there be in charge of such craft a lighterman licensed in manner hereinbefore mentioned, or an apprentice qualified as hereinbefore mentioned." The qualification of a lighterman (s. 56) is that he shall be of the age of nineteen or upwards and of good character, shall have served five years' apprenticeship, and shall for two years have been continuously engaged in working a barge, lighter, or other like craft within or through the limits of that Act, while an apprentice (s. 52) is treated as qualified to take sole charge of a barge if he has served two years' apprenticeship and has been found qualified upon examination. As in view of those qualifications it would be absurd to suppose that it was intended to compel the master of a sailing barge on coming within the limits of the Act to place her in the charge of a person who might be ignorant of sailing, the inference is that the words "barge, lighter, boat, or other like craft" in s. 66 were not intended to include sailing barges. And if they do not in s. 66, neither can they do so in s. 11, sub-s. 2 (*f*), of the Act of 1908, or in the port authority's by-law. In truth a seagoing sailing barge is a "ship," and the *George* is in fact registered as such under the Merchant Shipping Act, 1894. The Act of 1893 was followed by the Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), which treats sailing barges and lighters in direct antithesis. By s. 3 the "owners of lighters," which term is there defined to include any barge or other like craft for carrying goods, means "owners of lighters used on the Thames and registered at Watermen's Hall," whereas by the same section "owners of sailing barges" are defined to mean "owners of sailing barges registered in the custom books of the port of London." By s. 311 "lighters passing entirely through the limits" of the Watermen's and Lightermen's Act, 1859, are exempted from the provisions of s. 66 of that Act. But that exemption is confined to lighters and does not extend to sailing barges. The same distinction between lighters and sailing barges is observed in the Thames Conservancy By-laws, 1898. By by-law 4 "The word 'lighter' means any dumb barge or other like craft for carrying goods, or any

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sailing barge with her mast and gear lowered on deck"; in other words it is only when a sailing barge ceases to fill that character that it becomes a lighter. Again, the lights and sound signals to be used by sailing barges differ from those required to be used by lighters. By by-law 29 a sailing vessel under way is prohibited from carrying a white light, whereas by by-law 31 a lighter is required to carry one. By by-law 36 sailing vessels are required to give certain signals by means of a fog-horn, which lighters are not required to give. Then comes the Port of London Act, 1908, which by s. 11, sub-s. 1, transferred the powers of the Watermen's Company to the port authority; and that Act draws the same distinction between lighters or barges and sailing vessels. A sailing barge is for the purposes of that Act treated as a "ship," for that expression by s. 49 "includes every description of vessel used in navigation not propelled by oars." By s. 11, sub-s. 2 (*d*), the exemption from the provisions of s. 66 of the Act of 1859 given by s. 311 of the Thames Conservancy Act, 1894, to lighters passing entirely through the limits of the Act is extended to lighters entering the limits of the Act either from the east or from the west and returning outside the limits by the same way that they entered. But it does not extend it to sailing barges. It only alters the circumstances under which the exemption is to attach, and not the class of craft to which it is to apply. Then by s. 11, sub-s. 2 (*f*), "The provisions of the Thames Watermen's and Lightermen's Act, 1893, as amended by this Act—(i.) so far as they relate to craft, shall extend to all lighters, barges, and other like craft for carrying goods, and to steam tugs, and (ii.) so far as they relate to boats shall extend to all boats, wherries, and other such vessels (including river steamboats) let for hire for carrying persons—navigating either wholly or partly within the limits of that Act as so amended." Whereas the Act of 1893 required river craft to be registered by the Watermen's Company if used for carrying goods "within the limits of the Act," the Act of 1908 requires them to be so registered if navigating "either wholly or partly within the limits of the Act." But except for the addition of steam tugs it leaves the class of craft required to be registered as before; it does not apply to sailing barges. If a sailing barge is a "ship"

she must be registered under the Merchant Shipping Act; if she is a "lighter" she must be registered under the Watermen's and Lightermen's Act. But she cannot be required to be registered under both. A double registration would lead to inevitable confusion. For instance, in an action of damage by collision the question would arise as to whether the owners of the craft in fault could take proceedings for limitation of their liability; if she were a ship they could, if she were a lighter they could not. Or suppose an action is brought under the Employers' Liability Act by the man in charge of a sailing barge, how is the Court to decide whether the action will lie if she is registered under both Acts? For if she is a ship the man is a "seaman" and cannot claim the benefit of the Act (*Corbett* v. *Pearce* (1)), whereas if she is a barge or lighter he is a "workman" and can. Again a question might arise whether a sailing barge is within the admiralty jurisdiction or not, for a "lighter" has been held not to be a ship within the Admiralty Court Act, 1861, and the County Courts Admiralty Acts, 1868 and 1869: *Everard* v. *Kendall*. (2) Again the methods of computing the tonnage of vessels under the Merchant Shipping Act and the Port of London Act are very different. Under the former the burthen tonnage of the *George* is 110 tons, whereas under the latter it would be only 69 tons.

G. Wallace, *K.C.*, and *C. B. Marriott*, for the defendants. The main object of s. 11 of the Port of London Act, in transferring to the port authority the powers of the Watermen's Company with respect to the registration of craft, was to raise revenue for the maintenance of the port. In all the private Acts of the various dock companies whose undertakings were transferred to the port authority there was what was known as a "free water clause," that is to say, a provision that lighters, barges, and other like craft should be exempt from the usual tonnage rates chargeable on vessels entering a dock, provided they entered for the purpose of discharging or receiving ballast or goods to or from any vessel lying therein. Though the Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), as amended by s. 7 of the Thames Conservancy Act, 1905 (5 Edw. 7, c. cxcviii.), imposed

(1) [1904] 2 K. B. 422. (2) (1870) L. R. 5 C. P. 428.

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tonnage dues for the benefit of the river navigation on vessels trading coastwise, vessels whose registered tonnage did not exceed 45 tons, a class which would include the majority of sailing barges, were expressly exempted. Again, though the Thames Watermen's and Lightermen's Act, 1893, and the by-laws thereunder did impose fees on all barges and craft which traded wholly within the limits of that Act, that is to say, between Teddington Lock and Lower Hope Point, such fees were of nominal amount, never exceeding 5*s.* per craft. The result of all the enactments was that the vast majority of craft contributed nothing to the general upkeep of the port. It is contended that the Legislature, when it created the new port authority amalgamating all the interests in the port, intended to distribute the burden of its expenditure over all classes of vessels using its accommodation. This is borne out by the terms of s. 11, sub-s. 2 (*e*), of the Port of London Act, which provides that "so much of any such enactment as limits the fees which may be imposed in respect of the registration of craft and boats shall be repealed," and by the Port of London (Registration of Craft) Order Confirmation Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. xcix.), which authorizes the substantial charge for every lighter, barge, or other like craft of 1*s.* per ton, a rate of charge which is obviously meant to raise revenue, and to raise it proportionately to the use of the port, and which thus differs entirely from the old registration fees which went to the Watermen's Company. There is, therefore, no reason to exempt any class of craft from the scope of the plain words of s. 11, sub-s. 2 (*f*) (i.), of the Port of London Act, 1908, or to make any exception beyond those expressly stated in the section itself. In *Burham Brick, Lime and Cement Co.* v. *London and India Docks Joint Committee* (1), a case tried in 1899, a sailing barge was treated as a "lighter, barge, or other like craft" for the purpose of taking the benefit of the free water clauses relating to the Tilbury Dock. The point that it did not come within those words was distinctly raised on the pleadings but taken to be quite unarguable by both counsel and judge. The proper and natural description of the *George* is that of a barge. A

(1) Unreported.

barge is either a dumb barge or a sailing barge or (in the last few years) a steam barge. It is clear that a sailing barge is not a "ship" in the ordinary sense of the word.

With respect to the contention that a double registration of a sailing barge under the Merchant Shipping Act and the Port of London Act could not have been intended, it is enough to point to the language of s. 11, sub-s. 2 (*f*), itself, which, after enacting that the registration provisions of the Act of 1893 shall apply to river steamboats, goes on to provide that "where a certificate has been granted under the Merchant Shipping Act, 1894, as to the number of passengers which any river steamboat is fit to carry, that number shall be the number of persons which she shall be licensed to carry under the said Act as so amended," i.e., under the Act of 1893 as amended by the Act of 1908. That shews that double registration was expressly contemplated. The suggested difficulty about having to employ a licensed lighterman on a sailing barge from outside when it comes within the limits of the port is based upon the assumption that because the same group of words—"lighter, barge, and other light craft"—is used both in the Act of 1859 and in that of 1908 they must necessarily mean the same thing in both Acts. But the two Acts are not in pari materia. The Act of 1859 had nothing to do with the raising of revenue, and it may well be that a much more limited construction may be put on the words in that Act than in the Act before the Court.

HAMILTON J. This action is brought to recover 1*l.* 0*s.* 9*d.* as money paid by the plaintiffs to the defendants under duress in respect of the registration of their sailing barge *The George*, and also for a declaration as to the true intent and meaning of by-law No. 4 of the Port of London (Registration of River Craft) By-laws, 1910, and a declaration that if its meaning is such as to justify the charge in question then the by-law is ultra vires. The by-law in question is this: "Every person shall on applying to the port authority for the registration or for the renewal of the registration of a steam tug, lighter, or barge other than a steam barge or canal barge or canal boat registered by the port authority as such respectively pay to the port authority

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the sum specified in this by-law," and then the mode of calculating the sum payable is added, which results in the sum, if any, of 1*l.* 0*s.* 9*d.* being payable for this particular barge. What enables the port authority to constrain persons to apply to them for the registration of a steam tug, lighter, or barge is the combined effect of s. 11, sub-s. 2, par. (*f*), of the Port of London Act, 1908, and of s. 7 of the Thames Watermen's and Lightermen's Act, 1893, which gave the late Thames Watermen's Company certain powers with respect, among other things, to the registration and licensing of craft and boats, which powers have now by s. 11, sub-s. 1, of the Act of 1908 been transferred to the port authority. The *George* is a "ship" within the definition of that term in the Merchant Shipping Act, 1894, because she is propelled otherwise than by oars, namely, by sails. She is accordingly registered under that Act at the port of Rochester, with a tonnage of 41·45 tons. She has, however, a much larger capacity than that registered tonnage might imply; she carries as much as 110 tons dead weight, and she makes voyages regularly from the river Swale to London and back. She occasionally goes along the east coast as far as Harwich, and she has been up the Thames as far as Walton-on-Thames. She has characteristics which in the opinion of the experienced harbour-master for the lower district of the port of London are important in determining how she should be named. She is nearly square in section; she has wing boards; she has the typical rig of a Thames sailing barge; she has a rudder outside the lines of the hull. She is regularly loaded down to a very small freeboard and has her cargo in her central compartment battened and tarpaulined down. I think there is no doubt that the term by which seamen and waterside characters would describe her is a sailing barge. And though she might be laxly described as a ship, "sailing barge" is her most appropriate description. The plaintiffs, however, contend that they are not compellable to register her, and that by navigating her within the limits of the port of London, although unregistered, they would commit no breach of any statute or by-law, and they rely upon the character of the vessel as well as the somewhat lengthy voyages that she makes.

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The first question is what is the power of the Port of London Authority? By s. 11, sub-s. 2, par. (*f*), of the Port of London Act, 1908, "The provisions of the Thames Watermen's and Lightermen's Act, 1893, as amended by this Act so far as they relate to craft shall extend to all lighters, barges, and other like craft for carrying goods . . . . navigating either wholly or partly within the limits of that Act as so amended" with certain exceptions which do not apply to this case. There is no doubt that the *George* is regularly navigated partly within the limits of the Act of 1893 as so amended, and she is engaged in carrying goods. Is she then within the words "all lighters, barges, and other like craft for carrying goods"? If she is, the provisions of s. 7 of the Act of 1893 apply to her, and that section provides that no craft shall be worked or navigated within the limits of that Act unless a certificate relating to such craft shall have been issued in pursuance of that Act. The circumstance that the *George* is registered under the Merchant Shipping Act is by no means conclusive to shew that she does not also require registration under the Port of London Act; the reference in s. 11, sub-s. 2 (*f*), of that Act to river steamboats negatives such a conclusion. Prima facie as this sailing barge is a barge it is within the words "all barges," and I think the word "all" cannot be limited to an enumerative use of that word, but is wide enough to cover all kinds and descriptions of barges. If the clause was intended to deal only with all barges in the enumerative sense it would have been enough to say that the provisions should extend to "lighters, barges, and other like craft," omitting the word "all"; and therefore, on the plain construction of these words, "all barges" must include this sailing barge. She is not the less a barge because she is ordinarily propelled by sails. The plaintiffs, however, say that there are many considerations which shew that this construction is highly inconvenient, and some which shew that it cannot have been intended. For example it is pointed out that under the Thames Conservancy By-laws the terms "sailing vessels" and "lighters" are used antithetically, and that the lights and signals required on a lighter are different from those required on a sailing vessel. That no doubt is true,

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but it is in my opinion not sufficient to allow of my departing from the natural construction of the words "all lighters, barges, and other like craft." The same observation applies to the objection that if there are to be two registers there will be risk of doubt whether a person on board such a craft is a seaman outside of the Employers' Liability Act, whether the *George* is a ship and entitled to limit her liability, or whether she is or is not amenable to the admiralty jurisdiction. A more formidable consideration is what is to be done where a sailing barge such as this is navigated within the limits of the port authority without having a licensed lighterman or qualified apprentice in charge. By s. 66 of the Watermen's and Lightermen's Act, 1859, "No barge, lighter, boat, or other like craft for the carrying of goods, wares, or merchandise shall be worked or navigated within the limits of this Act unless there be in charge of such craft a lighterman licensed in manner hereinbefore mentioned or an apprentice qualified as hereinbefore mentioned" subject to a penalty. When one looks at the qualifications of an applicant for a lighterman's licence, or of an apprentice who is to be regarded as qualified to take sole charge of a barge, it must be conceded that their qualifications are not such as to suggest that they need have any knowledge of the management of a sailing vessel. It is objected for the plaintiffs that if the *George* is a barge within s. 11, sub-s. 2 (*f*), of the Act of 1908 she must also be a barge within the meaning of s. 66 of the Act of 1859. The result of that might be that when the vessel reached the limits of the port authority, though still under sail and requiring even more careful navigation than before, the sailing master who understands how to sail her is to stand aside and hand over the charge of her to the licensed lighterman or qualified apprentice, though there is no guarantee that either knows anything whatever about sailing. The answer to that objection is that s. 66 has no application to a sailing barge, for it applies only to barges navigated "within the limits of this Act," that is wholly within its limits, and barges navigated wholly within the limits of the Act are not such as are propelled by sails. The object of the Act of 1859 was twofold,—to maintain the privileges of the Watermen's

and Lightermen's Company and their licensees, and at the same time to impose proper regulations for controlling them in the exercise of their privileges; and presumably the area of control was intended to be co-extensive with the area of privilege, that is to say, to be confined to the limits of the Act. This reason does not apply to the interpretation of s. 11, sub-s. 2 (*f*), of the Act of 1908. That Act extends the right of controlling the registration of craft in two ways. It in terms adds two other classes of vessels to those previously requiring registration, namely, steam tugs and river steamboats, and by prefixing the word "all" before the words "lighters, barges, and other like craft" it enlarges the class of barges to which the Act is to apply. Having regard to the fact that the function of the port authority is much wider than that of the Watermen's and Lightermen's Company, and that the powers of the company are transferred to the port authority primarily for disciplinary purposes, I do not think that there is any insuperable difficulty in the way of treating the words "no barge, lighter, boat, or other like craft" in s. 66 of the Act of 1859 as more limited than "all lighters, barges, and other like craft" in the Act of 1908. Moreover the inclusion of the word "boat" in s. 66 seems to be restrictive of the size and seagoing importance of the different craft and to indicate a dividing line which would exclude the *George*. It has, no doubt, been forcibly pointed out that the Legislature seems to have thought that the words "within the limits of this Act" in s. 66 either meant "wholly or partly within the limits" or might be so understood, because in s. 311 of the Thames Conservancy Act, 1894, it is provided that "Nothing in . . . . section 66 of the Watermen's Company's Act shall apply to any lighters passing entirely through the limits of that Act," and s. 11, sub-s. 2 (*d*), of the Port of London Act, 1908, says that to the words of s. 311 of the Act of 1894 there shall be added the words "or to any lighters on a voyage commencing or ending at any place eastward or westward of the limits of that Act, whether or not goods are in the course of the voyage taken in or discharged at any place within those limits," and it is urged that those provisions were entirely unnecessary if the words "within the limits of this Act"

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in s. 66 of the Act of 1859 meant "wholly within the limits of the Act." In my opinion those provisions were introduced not because there was any doubt as to the meaning of s. 66, but in order that those who wished to be protected from the necessity of employing licensed lightermen might have the provision clearly stated on the face of the enactment. I have come to the conclusion that this construction of s. 66 as not applying to a sailing barge is sound, but even if it were not, I think the words of s. 11, sub-s. 2 (*f*), of the Act of 1908 are too explicit to warrant me in restricting their scope and saying that although the registration provisions extend to "all barges" still they do not extend to a sailing barge merely because the consequence might follow that at a certain point of her voyage within the area ordinarily navigated by barges she might have to be taken out of the charge of her master and placed in that of a licensed lighterman. My judgment must be for the defendants.

Judgment for defendants.

Solicitors for plaintiffs: *Jackson, Bowles & Jackson.*
Solicitor for defendants: *E. Glenshaw.*

J. F. C.

FOX *v.* CENTRAL SILKSTONE COLLIERIES, LIMITED.

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June 19.

County Court—Practice—Taxation of Costs—Claim and Counter-claim—Both Parties Successful—Brief Fee—County Court Rules, 1903, *Order* LIII., *r.* 16.

In an action in a county court the defendants contested the claim and counter-claimed. Judgment was given for the plaintiff on the claim for 25*l.* and costs, and for the defendants on the counter-claim for 26*l.* and costs. On taxation of the costs of the claim the registrar allowed a brief fee of three guineas, being the maximum fee according to the scale applicable to the amount recovered. No objection was taken by the defendants to this allowance. On taxation of the costs of the counter-claim the registrar also allowed a brief fee of three guineas. An objection by the plaintiff that the scale only authorized the allowance of one brief fee and that the maximum fee having been allowed on the claim no brief fee could in the circumstances be allowed on the counter-claim was overruled by the county court judge. On appeal to the Divisional Court:—

Held, that the fact that the maximum brief fee had been allowed in respect of the claim did not prevent the allowance of a brief fee for the counter-claim, but that the fee must be apportioned between the defence and the counter-claim, and only that part which was referable to the counter-claim could be allowed.

Shrapnel v. *Laing* (1888) 20 Q. B. D. 334, and *Atlas Metal Co.* v. *Miller* [1898] 2 Q. B. 500, followed and applied.

APPEAL from the City of London Court.

The action was brought to recover 28*l.*, being arrears of salary due to the plaintiff as the defendants' traveller. The defendants defended the action on the ground that only 16*l.* was due to the plaintiff and that against that sum they had a set-off of 9*l.* for money lent. The defendants also counterclaimed the return from the plaintiff of two first-class traders' railway contracts or their value. At the trial judgment was given for the plaintiff on the claim for 25*l.* and costs, and for the defendants on the counter-claim for 26*l.* and costs.

Order LIII., r. 16, of the County Court Rules, 1903, provides that "Where a counter-claim is raised and tried, unless the judge otherwise orders, the scale upon which the costs of the parties are to be taxed shall be determined as follows: . . . . (3.) If both parties are successful, by the amounts which they recover on their respective claims." The scale of costs applicable to the

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amounts recovered on both claim and counter-claim was the Higher Scale, column B. The registrar taxed the plaintiff's bill of costs of the claim and the defendants' bill of costs of the counter-claim on that scale, and in both cases allowed the maximum fee of three guineas for counsel's brief. The plaintiff carried in a number of objections to the taxation of the costs of the counter-claim. For the purposes of this report it is only necessary to deal with one item in the bill, namely, the fee of three guineas allowed in respect of counsel's brief. The grounds of objection to this allowance were that the plaintiff was entitled to the general costs of the action, and that the defendants were entitled to recover the costs of the proceedings only so far as they had been increased by reason of the counter-claim; that the fee of three guineas would have been proper to allow in respect of the defence, and that the costs had not been increased by reason of the counter-claim; and that only such portion of the brief fee could be allowed as was disallowed to the plaintiff, and that the registrar had properly allowed to the plaintiff the full scale fee in respect of the claim. The registrar replied with regard to these objections that as by the judgment the defendants had the costs of the counter-claim the defendants were entitled by the scale to a brief fee of three guineas. The plaintiff applied to the deputy judge (Sir John Paget, K.C.) to review the taxation, and he affirmed the registrar's decision. The plaintiff appealed.

Coutts Trotter, for the plaintiff. The taxation of costs in the county court proceeds upon the same principles as govern taxation in the High Court, the only difference being that in the county court the amount to be allowed in respect of the various items in the bill is fixed by the scale. Under the Higher Scale, column B, the maximum sum allowable for the brief fee is three guineas. The scale does not authorize the allowance of more than one brief fee in the same action, even though the action is one in which the defendant has counterclaimed. In the present case the judgment for the plaintiff on the claim with costs gave to the plaintiff the general costs of the action, and the registrar in taxing those costs, in the exercise of his discretion, rightly allowed the maximum brief fee. The defendants did not bring in objections to that

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taxation, and in these circumstances there was no power to allow the defendants any brief fee in respect of the counter-claim. The registrar appears to have acted on the principle that the defendants' costs of the counter-claim ought to be taxed as if the counter-claim were a separate action. That is quite contrary to the law as laid down in *Shrapnel* v. *Laing* (1) and *Atlas Metal Co.* v. *Miller*. (2) Those authorities shew that the costs of the counter-claim only include such additional costs, over and above the costs of defending the action, as are actually incurred in proving the counter-claim, and, therefore, in any event it was wrong to allow the maximum brief fee on the counter-claim, as some part of the fee had reference to the defence. If the plaintiff had succeeded on both claim and counter-claim he would not have been entitled to two brief fees exceeding three guineas in the aggregate. It may be that the proper course was to have apportioned the one brief fee between the claim and the counter-claim, but, if so, the defendants should have raised that point on objections to the taxation of the costs of the claim. They did not do so, and, therefore, the whole fee authorized by the scale for the brief having been given to the plaintiff, the defendants cannot now be allowed any brief fee on the counter-claim.

A. Neilson, for the defendants. The fallacy underlying the argument for the plaintiff is that it assumes that only one set of costs is to be allowed for both claim and counter-claim. Both Order LIII., r. 16, and the practice as explained by Lord Esher M.R. in *Shrapnel* v. *Laing* (1) contemplate separate taxations of separate bills of costs, and there is no ground for the suggestion that in the county court only one maximum brief fee can be allowed. There is nothing to shew that the registrar in the exercise of his discretion was not right in allowing the defendants the maximum brief fee for the counter-claim. [He referred to *Finska Angfartygs Aktiebolaget* v. *Brown & Co.* (3)]

RIDLEY J. In this case the question arises as to the taxation of costs in an action in which the plaintiff recovered judgment on the claim with costs, and the defendant recovered judgment

(1) 20 Q. B. D. 334. (2) [1898] 2 Q. B. 500.
(3) [1891] W. N. 116.

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on the counter-claim with costs. The rule applicable to the case is Order LIII., r. 16, of the County Court Rules, which provides that "Where a counter-claim is raised and tried, unless the judge otherwise orders, the scale upon which the costs of the parties are to be taxed shall be determined as follows: . . . . (3.) If both parties are successful, by the amounts which they recover on their respective claims." In this case the scale applicable to the amount recovered both on the claim and the counter-claim is the Higher Scale, column B, under which the brief fee is not to exceed three guineas. I do not agree with the argument of counsel for the plaintiff that in the circumstances of this case, the maximum brief fee having been allowed on the taxation of the costs of the claim, no brief fee at all can be allowed in respect of the counter-claim. According to the principles laid down in *Shrapnel* v. *Laing* (1) and *Atlas Metal Co.* v. *Miller* (2) for the purposes of taxation a counter-claim is to be treated as an independent cause of action; and it may be, therefore, that in a particular case it would be quite proper to allow the maximum brief fee of three guineas in respect of a successful claim and also in respect of a successful counter-claim. But there is another principle which has to be borne in mind, and that is that if the work in respect of which the fee has been paid relates both to the claim and the counter-claim the fee must be apportioned between the two, and in the case of a plaintiff who has succeeded on the claim and failed on the counter-claim, only so much of the brief fee as is apportioned to the claim ought to be allowed on taxation of the costs of the claim. The same principle applies to the taxation of the costs of the counter-claim where the defendant has succeeded on the counter-claim, but failed in his defence to the claim. The defendant in that case is not to be allowed merely a part of the plaintiff's brief fee, but is to be allowed such a fee within the limits of the scale as is properly apportionable to that part of his case, namely, the counter-claim, as to which he has succeeded, as distinguished from the defence to the claim on which he has failed. In the present case the registrar has allowed the maximum brief fee on the counter-claim not because the fee was referable solely to the

(1) 20 Q. B. D. 334. (2) [1898] 2 Q. B. 500.

work of proving the counter-claim, but because, in the registrar's opinion, the defendants, having by the judgment been given the costs of the counter-claim, were entitled to the maximum brief fee. In my opinion that answer of the registrar shews that he has not addressed his mind to the proper question, and the case must, therefore, go back to the county court for a further taxation, unless the parties can agree as to the amount to be allowed.

Bray J. I am of the same opinion. The registrar in answer to the plaintiff's objection to the allowance of the maximum brief fee in respect of the counter-claim has stated that as by the judgment the defendants had the costs of the counter-claim they were entitled by the scale to a brief fee of three guineas. For reasons which I will state that answer is, in my opinion, wrong. We have to apply to this case the practice of the High Court as to taxation where there is a claim and counter-claim, which is now substantially settled. It makes no difference whether the plaintiff or the defendant has succeeded, and I will take a case where the defendant has succeeded on the claim and failed on the counter-claim, as was the case in *Atlas Metal Co.* v. *Miller.* (1) I will assume that the fees marked on the plaintiff's and defendant's briefs are fifty guineas, which are for both claim and counter-claim. The first question the taxing Master has to consider is what is the proper fee to be allowed for both. He may think that forty guineas would be enough. The next question is how is the forty guineas to be divided between the claim and counter-claim. In *Shrapnel* v. *Laing* (2) Lord Esher M.R. said: "If the same counsel appears (as is generally the case now) for the plaintiff both as regards the claim and the counter-claim, and all his instructions are contained in one brief, that brief is treated by the taxing Master as two, that is to say, so much of it as relates to the claim and its issues will belong to the claim, and so much of it as relates to the counter-claim and its issues will belong to the counter-claim. In the same way if one fee be marked on the brief it will be treated as two fees." Therefore, in the case I have supposed, the taxing Master will divide the forty guineas into two parts, and if he decide, for example, to apportion it in this way, ten guineas for

(1) [1898] 2 Q. B. 500. (2) 20 Q. B. D. at p. 339.

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the claim and thirty guineas for the counter-claim, the defendant who has succeeded on the claim will be allowed a brief fee of ten guineas on the taxation of his costs of the claim, and similarly the plaintiff who has succeeded on the counter-claim will be allowed a brief fee of thirty guineas.

The same principle applies to taxation in the county court, except that Order LIII., r. 16, provides that the costs of both parties are to be taxed according to the scale applicable to the amounts which the parties recover on their respective claims. In the present case the same scale, column B of the Higher Scale, is applicable to both claim and counter-claim, and under that scale the maximum brief fee allowable is three guineas. The registrar is entitled to find that the maximum fee of three guineas is the proper fee for attempting to defeat the claim and for proving the counter-claim. He may be of opinion that the whole fee is properly referable to proving the counter-claim, but it is most unlikely that that will be so, and it is not so in the present case, for the defendants contested the claim, or a part of it. Therefore, unless the circumstances are very exceptional, the registrar must, in the exercise of his discretion, apportion the three guineas, and decide how much is to be allowed for proving the counter-claim and how much for attempting to defeat the claim. In the present case, where the defendants have failed on the claim and succeeded on the counter-claim, the registrar should have allowed on the taxation of the costs of the counter-claim only that portion of the three guineas which in his opinion ought to be allowed for proving the counter-claim, and the case must go back in order that he may do this. I wish to add that we are giving no decision as to the propriety of the costs allowed to the plaintiff in respect of the claim, for the defendants did not bring in any objections to the taxation of the plaintiff's costs.

Appeal allowed.

Solicitors for plaintiff: *Corbin, Greener & Cook, for Hugh Bury, Barnsley.*

Solicitors for defendants: *Pritchard & Sons, for Collins, Robinson, Driffields & Kusel, Liverpool.*

F. O. R.

GLAMORGAN COUNTY COUNCIL *v.* BARRY OVERSEERS.

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April 23.

Rates—Appeal—County Rate—Parish aggrieved—Cause of Appeal—Time for giving Notice of Appeal—Overpayment by Parish—Recovery of Overpayment—County Rates Act, 1852 (15 & 16 *Vict. c.* 81), *ss.* 22, 23.

By s. 22 of the County Rates Act, 1852, if the overseers of the poor shall have reason to think that a parish is aggrieved by any rate made upon the basis or standard for the county rate, they may appeal to the next quarter sessions after "such cause of appeal" shall have arisen.

By s. 23 of the Act, if it appears to the Court of quarter sessions that any parish has previously to the determination of the appeal paid any sums of money in consequence of such rates which ought not to have been paid, the Court shall order the proportion so paid subsequently to the notice of appeal to be repaid to the parish.

On March 17, 1910, a county council fixed the county rate assessment basis for a parish, and on the same day made a rate on the basis so fixed. The county council forwarded their warrant for the first instalment to the guardians of the union in which the parish was included, making the instalment payable by two equal payments. The guardians of the union in due course issued their precept to the overseers of the poor for the amount of the warrant, making it payable in two equal portions, one portion being made payable on August 20, 1910.

The county council subsequently forwarded their warrant for the second instalment to the guardians of the parish, making it payable by two equal payments, and the guardians duly issued their precept to the overseers for the amount of the warrant, making it payable in two equal portions, one portion being made payable on February 18, 1911. The parish overseers made the payments in August, 1910, and February, 1911, as required by the precepts.

On September, 2, 1910, a railway company gave notice to the assessment committee of the union in which the parish was included of objection to their assessment in respect of a portion of their line within the parish on the ground of over assessment, and similar notices were during 1910 given by other ratepayers within the parish. For the purposes of the present case the poor rate valuation was taken to be the same as the county rate assessment basis.

On September 27, 1910, the parish overseers gave notice to the county council that they felt aggrieved by and objected to the county rate of March 17, 1910, and that they intended to appeal against the rate at the next quarter sessions for the county.

On April 13, 1911, the union assessment committee reduced the assessment of the railway company, and from time to time the assessment of the other objectors. The parish overseers subsequently repaid to the railway company and other objectors 121*l.* 6*s.* in respect of over assessment to the county rate as regarded the instalment payable on

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August 20, 1910, and 107*l.* 5*s.* as regarded the instalment payable on February 18, 1911.

The hearing of the appeal of the parish overseers to quarter sessions was by consent respited from time to time and ultimately took place on June 27, 1911, when the Court of quarter sessions ordered the county council to refund to the parish overseers the two sums of 121*l.* 6*s.* and 107*l.* 5*s.* as being the amounts overpaid by them in August, 1910, and February, 1911, respectively:—

Held, that it was not competent for the Court of quarter sessions to hear the appeal or to order repayment by the county council to the parish overseers of either of the two sums inasmuch as, assuming that the parish overseers were aggrieved, the grievance arose either on March 17, 1910, when the county rate was made, in which case the notice of appeal of September 27, 1910, was too late, or on April 13, 1911, when the reduction in the assessment of the railway company and the other objectors was made by the union assessment committee, in which case the notice of appeal was premature.

Held, further, that, even if the notice of appeal had been given at the proper time, the Court of quarter sessions would have had no power to order repayment to the overseers of the sum of 121*l.* 6*s.* inasmuch as the payment of that sum was made by them in August, 1910, before their notice of appeal to quarter sessions of September 27, 1910, was given, and under ss. 22 and 23 of the Act of 1852 power is only conferred on a Court of quarter sessions to which the overseers appeal against a county rate to order repayment to the overseers of any sums overpaid by them after their notice of appeal against the county rate is given by them.

CASE stated by justices for the county of Glamorgan.

On March 17, 1910, the appellants, the Glamorganshire County Council (hereinafter called the county council), upon the report of the county rate assessment committee made under s. 20 of the County Rates Act, 1852, on certain partial change of value of portions of the property liable to be assessed, after due notice given to the respondents, the overseers of the poor of the parish of Barry, altered the county rate assessment basis for the parish of Barry (which is included in the Cardiff Union and forms part of the administrative county of Glamorgan) and fixed the basis for the parish at 265,757*l.*

On the same date the county council made a rate based on the basis so fixed, and on April 13, 1910, forwarded their warrant for the first instalment of the amount due from the Cardiff Union, making the same payable by two equal payments on June 1, 1910, and September 1, 1910.

The guardians of the Cardiff Union in due course issued their precept to the overseers of the poor for the amount of this warrant, making it payable in two equal portions on May 21, 1910, and August 20, 1910.

On October 6, 1910, the county council forwarded their warrant for the second instalment of the amount due from the Cardiff Union, making the same payable by two equal payments on December 1, 1910, and March 1, 1911, and the guardians duly issued their precept to the overseers of the poor for the amount thereof, making it payable in two equal portions on November 19, 1910, and February 18, 1911.

The overseers of the poor of the parish of Barry paid the amounts mentioned in the precepts to the Cardiff Union promptly as required by those precepts.

Included in the assessable value of the parish of Barry was a portion of the line of the Barry Railway Company which in the valuation of the parish made by the union assessment committee under the Union Assessment Acts, 1862 to 1880, was of an assessable value of 144,847*l.*

On September 2, 1910, the Barry Railway Company gave notice to the Cardiff Union Assessment Committee of objection on the ground of over assessment, and similar notices were at divers times during the year 1910 given by a number of other ratepayers in the parish of Barry.

On April 13, 1911, the assessment committee of the Cardiff Union reduced the assessment of the Barry Railway Company in the valuation list by 5159*l.* and from time to time the assessment of the other objectors. Various new properties came into the valuation list from time to time during the year, and, as the result of these reductions and additions, the total assessable value of the parish in the union valuation list on April 13, 1911, was 262,130*l.*, and the reduction in the total assessable value of the parish in the valuation list related so far as the overseers were concerned to the year ended March 31, 1911.

The overseers of the poor for the parish of Barry subsequently repaid the Barry Railway Company and the other objectors the amounts by which the precepts for the poor rate as issued by the guardians exceeded the poundage rate on the valuation list as

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reduced, and these repayments included the sum of 121*l.* 6*s.* in respect of over assessment to the county rate as regards the instalments thereof payable by August 20, 1910, and the sum of 107*l.* 5*s.* in respect of over assessment to the rate as regards the instalments thereof payable by February 18, 1911.

On September 27, 1910, the Barry overseers served upon the county council notice that they felt aggrieved by and objected to the county rate of March 17, 1910, on the ground of the altered state of the property assessed or some part thereof and on the ground that the rate was made on a county rate basis which was unfair, unequal, and incorrect, and gave notice of their intention to appeal against the rate at the then next general quarter sessions of the peace for the county of Glamorgan. On the same date the Barry overseers also served notice of objection to the county rate basis or standard then in force.

The hearing of the appeal was by consent respited from time to time and came on for determination at the general quarter sessions of the peace for the county of Glamorgan holden at Cardiff on June 27, 1911.

The only grounds on which it was contended by counsel for the Barry overseers (the then appellants) that they were entitled to relief was that the assessable value of the parish had been reduced by the Cardiff Union Assessment Committee on April 13, 1911, in consequence of the objections by the Barry Railway Company and others on notices of September 2, 1910, and other dates prior to September 30, 1910, and that as a result certain sums which they had paid to the county council in respect of the county rate had to be refunded by them to the successful objectors named.

It was objected by counsel for the county council that it was not competent for the Court of quarter sessions to entertain the appeal, it not having been brought to the next quarter sessions of the peace after the cause of appeal had arisen as required by s. 22 of the County Rates Act, 1852 (1),

(1) County Rates Act, 1852 (15 & 16 Vict. c. 81), s. 22: "If the . . . . overseers of the poor of any parish . . . . shall at any time thereafter have reason to think that such parish . . . . is aggrieved by any rate or assessment now existing, or hereafter to be made upon the basis

but the Court overruled the objection, holding (1.) that the Court was bound by the decision in *West Riding of Yorkshire*

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or standard hereinbefore mentioned, ... whether it be on account of the proportions assessed upon the respective parishes . . . . being unequal, or on account of some one or more of them being without sufficient cause omitted altogether from the rate, or on account of such parish . . . . being rated at a higher proportion of the pound sterling according to the fair annual value of the rateable property therein, or on account of some other parish or parishes . . . . being rated at a lower proportion of the pound sterling according to the fair annual value of the rateable property therein than has been fixed and declared by the justices of the peace of the said county in sessions assembled as the basis of the rate of the said county, or on account of the altered state of the value of the property assessed, or any part thereof, or shall have any other just cause of complaint whatsoever, it shall be lawful for such . . . . overseer or overseers of the poor . . . . to appeal to the justices of the peace for the county at the next quarter sessions of the peace after such cause of appeal shall have arisen, against such part of the rate only as may affect the parish or parishes . . . . which are unequally rated, or which shall appear to be over-rated or under-rated, or omitted altogether from the rate; . . . . and the said justices are hereby empowered to hear and finally determine the same, and either to confirm such parts of the rate as have been appealed against, or to correct such inequalities, disproportions, or omissions as shall be proved to exist therein, as well in respect of the basis or standard as in the assessment of the rate made thereon, in such manner as to them the said justices shall appear fair, just, and equitable anything in this Act, or any former Act or Acts, or any law, usage, or custom, to the contrary thereof notwithstanding . . . ."

Sect. 23: "From and after the passing of this Act, the county rate or rates made upon any parish . . . . shall be paid, and shall and may be levied, recovered, and received, notwithstanding any appeal or appeals may have been made to the quarter sessions of the peace against any such rate or rates, and such rate or rates shall continue to be raised, levied, and received until the decision of the justices shall be made upon such appeal or appeals: Provided always, that if upon the hearing of any such appeal or appeals the Court of quarter sessions of the peace shall order any rate or assessment to be set aside, decreased, or lowered, and it shall appear to the said Court that any parish . . . . hath, previously to the determination of such appeal or appeals, paid any sum or sums of money in consequence of such rates or assessments which ought not to have been paid or charged therein, then and in every such case the said Court shall order such proportion of such sum or sums of money as shall have been so paid by any . . . . parish . . . . subsequently to the notice which shall have been given of such last-mentioned appeal or

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County Council v. *Middleton Parish Council* (1) that the appeal must be brought to the next practicable quarter sessions after the parish is in fact aggrieved; (2.) that in the case before the Court the parish of Barry was in fact aggrieved by the notification of objection of September 2, 1910, by the Barry Railway Company and not by the making of the rate; (3.) that the quarter sessions of October, 1910, at which the appeal was duly entered was the first practicable quarter sessions after the parish was in fact aggrieved. Consequently the Court proceeded to hear the appeal.

Counsel for the county council contended that, assuming (without admitting) that it was competent for the Court of quarter sessions to entertain the appeal, there was no power to order repayment by the county council to the Barry overseers of any sums repaid by the overseers to the Barry Railway Company and other objectors to the assessment to the county rate in respect of sums payable by such objectors before September 27, 1910, the date of the notice of appeal.

The Court of quarter sessions allowed the appeal with costs and ordered the county council to refund to the Barry overseers the sum of 121*l.* 6*s.* repaid by them to the Barry Railway Company and sixteen other objectors in respect of the instalment of the rate payable by them by August 20, 1910, and 107*l.* 5*s.* repaid by them in respect of the instalment of the rate payable by the objectors by February 18, 1911, and ordered that the county rate should be decreased accordingly.

The questions for the opinion of the Court were (1.) whether the Court of quarter sessions was right in holding that the parish of Barry was in fact aggrieved by the notification of objection of September 2, 1910, by the Barry Railway Company, and not by the making of the rate, and whether the appeal of the Barry overseers was brought to the proper Court of quarter sessions as required by the County Rates Act, 1852, s. 22; (2.) whether in any event the Court of quarter sessions had power to order the

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appeals, to be repaid and returned to the . . . . parish . . . . which . . . . hath paid the same . . . . out of the general rate of the county in which the cause of appeal shall have arisen."

(1) [1906] 2 K. B. 157.

county council to refund to the Barry overseers the sum of 121*l.* 6*s.*

Macmorran, K.C., and *A. Parsons*, for the appellants. For the purposes of the present case it is assumed that the poor law valuation was the same as the county rate basis, although county councils do not always adopt the poor law valuation. Two questions arise. The first is whether the appeal by the Barry overseers to quarter sessions was in time, i.e., whether it was brought to the next quarter sessions after the cause of appeal had arisen in compliance with the requirement of s. 22 of the County Rates Act, 1852.

The appeal of the Barry Railway Company to the assessment committee against their assessment was an appeal against the current poor rate based on the fact that they had from the beginning been assessed at too high a figure, and the appeal by the overseers on September 27, 1910, to quarter sessions against the county rate was an appeal alleging that the 265,757*l.* at which the county basis was fixed on March 17, 1910, had been too large from that date.

At the time when the notice of appeal by the overseers was given the poor law valuation had not in fact been altered. No alteration was made in the poor rate valuation till April 13, 1911. The appeal against the county rate is a summary remedy in respect of the same over assessment, and the cause of appeal arose at the time when the county rate was made on the over assessment, i.e., March 17, 1910. The "cause of appeal" under s. 22 of the Act of 1852 is the making of the rate.

The cause of appeal had either arisen on March 17, 1910, when the rate was made, in which case the appeal to quarter sessions on September 27, 1910, was too late, or it arose on April 13, 1911, when the Cardiff Union Assessment Committee reduced the rate of the Barry Railway Company, in which case the notice of appeal of September 27, 1910, was too early. On September 2, 1910, the Barry overseers merely feared that the assessment of the Barry Railway Company might be reduced, but that fear did not give them a cause of appeal.

No doubt an alteration in value during the currency of a rate

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might give a cause of appeal, as for instance where a fire occurred destroying a large area of property. It may be that such an occasion itself gives a right of appeal; but in the present case it is not suggested that the alteration in the valuation which the railway company succeeded in obtaining had arisen during the currency of the rate, because the objection of the railway company was that they had been over assessed from the beginning. The appeal to quarter sessions was therefore either too early or too late, and there was no jurisdiction to order repayment either of the sum of 121*l.* 6*s.* or of the sum of 107*l.* 5*s.*

The second point is that, assuming the appeal by the overseers to quarter sessions was in time, the overseers are only entitled under s. 23 of the Act of 1852 to have repayments made to them in respect of such payments as have been made subsequently to the notice of appeal: *West Riding of Yorkshire County Council* v. *Middleton Parish Council.* (1)

The Court of quarter sessions had no jurisdiction to order the repayment of the sum of 121*l.* 6*s.*, inasmuch as that amount was paid by the Barry Railway Company to the overseers and by the overseers to the guardians in August, 1910, i.e., before the notice of September 27, 1910, was given, and that payment is therefore not within s. 23 of the Act of 1852, which only authorizes repayments of sums paid after the notice of appeal to quarter sessions is given. [Sects. 2, 5, 7, 9, 13, 14, 15, 16, 17 and 21 of the County Rate Assessment Act, 1852, and *London County Council* v. *St. George's Union Assessment Committee* (2) were also referred to.]

Ivor Bowen, for the respondents. The notice of appeal on September 27, 1910, was given at the proper time. The words in s. 22 of the County Rates Act, 1852, "if . . . . at any time thereafter" the overseers "have reason to think that such parish . . . . is aggrieved," mean at any time after the making and during the currency of the rate if any one of the six conditions mentioned in the section arise. The words "at the next quarter sessions" contained in s. 22 mean that the appeal is to be at the next quarter sessions after the grievance

(1) [1906] 2 K. B. 157. (2) [1894] A. C. 600.

has arisen: *Imperial and Grand Hotels Co.* v. *Christchurch Guardians.* (1)

The contention upon behalf of the appellants does not give any effect to the words "if at any time" in s. 22. That section contains six grounds upon which an appeal may be lodged: (1.) on account of the proportion assessed on the respective parishes being unequal; (2.) on account of some one or more of the parishes being without sufficient cause omitted altogether from the rate; (3.) on account of such parish being rated at a higher proportion of the pound sterling according to the fair annual value of the rateable property therein; (4.) on account of some other parish or parishes being rated at a lower proportion of the pound sterling; (5.) on account of the altered state of the value of the property assessed or any part thereof; (6.) on account of the parish having any other just cause of complaint whatsoever. The first five are in substance included in the sixth, and the sixth ground enables the overseers to appeal if they think, as they did in the present case, that there has been some action taken by some large ratepayer which gives the parish a just cause of complaint. The overseers were in fact aggrieved when they received the notice that the Barry Railway Company objected to the assessment; they then had a just cause of complaint, and they took their complaint to the next quarter sessions.

The justices had power under s. 22 of the County Rates Act, 1852, to order repayment of the two sums which had been overpaid by the respondents. There is a distinction between s. 22 and s. 23. The effect of s. 23 is that after an appeal has been successful against the county rate or against the county rate basis the Court of quarter sessions has power to reduce the amount and to order repayment of any sums paid subsequently to the notice of appeal; but in s. 22 Parliament has given the justices upon an appeal against an alteration in the county rate power to do the same thing with reference to inequalities which have arisen before the date of appeal. The county rate is a rate made for the whole year. Therefore under s. 22 the justices had power to order the refunding of the 121*l.* 6*s.* The words of s. 22 giving the justices that power are "the said justices

(1) [1905] 2 K. B. 239.

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are hereby empowered to hear and finally determine the same, and either to confirm such parts of the rate as have been appealed against, or to correct such inequalities, disproportions, or omissions as shall be proved to exist therein, as well in respect of the basis or standard as in the assessment of the rate made thereon, in such manner as to them . . . . shall appear fair, just, and equitable, anything in this Act, or any former Acts . . . . to the contrary thereof notwithstanding." The words "anything in this Act, or any former Act to the contrary notwithstanding" enable the justices where they are satisfied that in the same current year there has been an inequality to act fairly and to order the return of the money which has been overpaid. There is nothing in *West Riding of Yorkshire County Council* v. *Middleton Parish Council* (1) to indicate that this point as to the meaning of s. 22 was taken in that case.

Macmorran, K.C., in reply. A right of appeal does not arise in respect of the county rate merely because a ratepayer gives notice of objection which may or may not be well founded to the assessment committee against his assessment.

For the purposes of the present case the appellants admit that the over assessment of the Barry Railway Company would be a grievance to the Barry overseers, but the over assessment took place on March 27, 1910. It was at that date that the right of appeal of the Barry overseers to quarter sessions arose upon the assumption which is made for the purpose of this case, that the county rate basis was the same all through the proceedings as the poor rate valuation. The notice of appeal of September 27, 1910, by the Barry overseers was therefore too late.

LORD ALVERSTONE C.J. In this case very difficult questions have been raised. I propose to indicate certain points upon which I express no opinion; they may arise in future cases. The material facts are that on March 17, 1910, the Glamorgan County Council estimated the county rate assessment basis for the parish of Barry at 265,757*l.*, and on the same day they made a rate on the basis so fixed. On April 13 they forwarded their warrant for the first instalment of the amount due from the Cardiff Union,

(1) [1906] 2 K. B. 157.

making the same payable by two equal payments on June 1, 1910, and September 1, 1910. Thereupon the guardians of the Cardiff Union issued their precept to the overseers of the poor for the amount of the warrant, making it payable in two equal portions on May 21, 1910, and August 20, 1910—i.e., a few days before the guardians had to make the payments to the county council, obviously in order that they might have the money in hand for the purpose of obeying the demand of the county council.

I am not satisfied that in the circumstances of the present case it is competent to the Barry overseers to raise the question of the amount of the valuation of individual hereditaments. I do not propose to deal with that question, which is a very difficult one, or to express any opinion upon it.

The payments were made by the Barry overseers on May 21 and August 20, 1910, as required by the precepts. On September 2, 1910, the Barry Railway Company gave notice to the Cardiff Union Assessment Committee of an objection to the poor rate on the ground of over assessment—there were other similar notices—and on April 13, 1911, the Cardiff Union Assessment Committee reduced the Barry Railway assessment by 5159*l.* There appear to have been other alterations in the poor rate assessment, the details of which are not given, but the result was, if poor rate assessments be taken as being the standard, that 262,130*l.* would be the amount of the county rate assessment basis for the parish of Barry. During this period, with the exception of the service of a notice on September 27, 1910, to which I shall presently refer, no steps had been taken to question the basis of the rate. The payments had been made in pursuance of the demands made by the county council. On September 27 the Barry overseers served upon the county council the notice that they felt aggrieved by, and objected to, the county rate of March 17, 1910,—that was in substance an objection to the basis of the county rate—on the ground of the altered state of the property assessed, or some part thereof, and on the ground that the rate was made on a county rate basis which was unfair, unequal, and incorrect, and they gave notice of their intention to appeal against the rate to the next quarter sessions for the county of Glamorgan. They also, on the

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same date, served notice of objection to the county rate basis. The matter in due course came before the quarter sessions, and the result was that the Court came to the conclusion that in consequence of the Barry overseers having repaid to the Barry Railway the overpayments which they were entitled to, the Barry overseers had paid too much in respect of the county rate, and they ordered repayment to them by the county council of the two sums of 121*l.* 6*s.* and 107*l.* 5*s.*

As to the first of the two payments, namely, 121*l.* 6*s.*, we are relieved from any real difficulty. It was made by the Barry overseers in August, 1910. The notice of appeal was given by the Barry overseers on September 27, 1910, and the appeal was heard at a much later date. For the protection of current rates which are to be levied, notwithstanding appeals, s. 23 of the County Rates Act, 1852, has provided that the county rate or rates shall be paid and may be levied, notwithstanding any appeal or appeals may have been made to the quarter sessions, and shall continue to be levied, and should it appear that any parish has previously to the determination of such appeal paid any money in consequence of such rates or assessments which ought not to have been paid or charged, in every such case the Court shall order such proportion of such sum of money as shall have been so paid by any parish subsequently to the notice which shall have been given of such appeal to be repaid. The object of that provision is to prevent an unsettlement of the accounts and the county authority being suddenly short of money, and in order that a parish may claim repayment of an overpaid sum it must be vigilant and give notice of appeal before it makes the overpayment, otherwise it cannot claim repayment of that sum. It is natural that a provision of that nature should be contained in a statute which deals with a public authority and public moneys. That is an answer to the right of the Barry overseers to recover the payment made by them in August, 1910.

The question raised with regard to the payment of the 107*l.* 5*s.* is one of greater difficulty, and we have to consider whether the Barry overseers were entitled to give the notice of appeal to quarter sessions at the time they did upon any of the six grounds

mentioned by Mr. Bowen. He admitted that he could not bring the appeal within either of the first four grounds, namely, (1.) that the proportion assessed upon the parish was unequal, (2.) that some parish had been omitted, (3.) that the parish had been rated at a higher proportion, or (4.) on account of some other parish being put at too low a proportion. The fifth ground which he mentioned was on account of the altered state of the value of the property assessed or any part thereof. I do not wish to be taken to express any opinion as to whether reduction in rateable value in fact for the current year might not be an altered state of the value of the property assessed. It would very likely depend on the way in which the altered state of the value of the property assessed had been brought about. There is nothing in the present case to shew a state of facts which would force us to the conclusion that the property of the parish of Barry is within those words, and Mr. Bowen rightly said it was enough if the Barry overseers could be shewn to be within the sixth ground, namely, that they had any just cause of complaint. The just cause of complaint which they had was, he said, that the overseers believed that the Barry Railway Company and the other ratepayers would probably, upon the assessment to the poor rate as it then existed, establish that the Barry overseers were not entitled to demand so much from them as they had done, and therefore the overseers would be making overpayments in the amounts collected from them. I think it right to say that the interdependence between the possible poor rate assessment and the county rate assessment is not an immaterial fact, and may in some subsequent case prove to be of great importance. The county council may have their own valuation. In the present case there is no statement that they adopted the poor rate valuation, although I understand that sometimes they do adopt it. Therefore in my opinion it cannot be assumed that because there has been an alteration in the poor rate assessment in property in the contributing area, that alteration would of necessity be a ground of appeal against the county rate. If it were not for another difficulty with which the Barry overseers are faced we might have to consider that more closely.

In my judgment there is an insuperable difficulty in the way of the overseers. Notice of objection was given by the Barry

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Railway on September 2, 1910. At that date no one could tell what would be the result of that objection. It might even lead to an increase in the Barry Railway rateable valuation. Not infrequently the rateable valuation is increased upon an objection being taken to it. No one could be certain that it would be reduced. It therefore seems extremely difficult to say that there was a just cause of complaint—there was certainly not one within the five specified causes—when the notice of appeal was given on September 27, 1910. It was not until the early part of the following year that the assessment committee reduced the poor rate assessment. No further step was taken by the Barry overseers. I express no opinion here as to what may be the rights of a person who has appealed against the county basis or valuation if it turns out in fact that the assessments in the contributing area have been altered or substantially reduced on appeal. There are no facts which enable us to determine that question in this case. In my judgment, the Barry overseers were either too early in giving that notice or they were too late. They ought to have ascertained what the amount of the valuation by the assessment committee of the Barry Railway Company's and the other objectors' property was before they gave their notice.

As far as *West Riding of Yorkshire County Council* v. *Middleton Parish Council* (1) is an authority applicable to the present case we are following it. With regard to the earlier payment of 121*l.* 6*s.* the judgment of my brother Ridley shews expressly that there can be no retrospective repayment. As to the second payment the point involved is as to whether the notice of appeal was given at the proper time, and upon this point the decision in *West Riding of Yorkshire County Council* v. *Middleton Parish Council* (1) does not help us, because the decision in that case was that the notice of appeal, which was given after the rateable value of the parish for the purpose of the county rate basis or standard was reduced, was too late. The facts in that case were so different from those in the present case that the decision does not help us upon the question whether the notice of appeal given by the Barry Union was given at the proper time.

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I come to the conclusion that in the present case the Court of quarter sessions was wrong, and that it had no power to give effect to the appeal by ordering the repayment to the Barry overseers of the amounts which they had to repay to the objectors who were held to be over assessed. Therefore this appeal must succeed, and our judgment must be for the appellants with costs.

PICKFORD J. I agree that the appeal must be allowed. With regard to the question of repayment, it seems to me practically beyond argument, because by the terms of s. 23 of the County Rates Act, 1852, it is expressly provided that the money which is to come from the rates shall be raised notwithstanding a notice of appeal, and that the repayment shall be made of any moneys that have been overpaid since the notice of appeal. The section does not provide in any way for repayment of money which has been paid before the notice of appeal. There was therefore no power to order repayment of any money paid before the notice of appeal was given.

Upon the question as to whether this appeal was rightly brought or not, I think that the Barry overseers are in a dilemma. The grievance which gave them a right of appeal, if it existed at all,—as to which I do not express any opinion in the circumstances of this case—arose at one of two periods, either when the rate was made or when the reduction of the assessment of the Barry Railway Company was made. It could not, in my opinion, arise simply when the notice of objection of the Barry Railway Company to the rate was served. If the grievance arose when the rate was made, the notice of appeal by the Barry overseers was too late. If it arose when the reduction of the Barry Railway Company's assessment was made, then the notice was too early. Therefore, whichever view be taken, it seems to me that this appeal was not rightly brought.

I do not think it is necessary to express an opinion whether a grievance in respect to which they could appeal ever arose or not in the circumstances of this case. If it did arise, it arose, in my opinion, at one or other of those points of time, and whichever of those points of time be taken the appeal to

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quarter sessions was not rightly brought and ought not to have been entertained. Therefore the present appeal ought to be allowed.

AVORY J. I agree for the same reasons.

Appeal allowed.

Solicitors for appellants: *W. H. Martin & Co., for G. David & Evans, Cardiff.*

Solicitors for respondents: *Burton, Yeates & Hart, for J. A. Hughes, Barry.*

J. E. A.

END OF VOL. II.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1912, will be as follows:—

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ADULTERATION—*Cream—Sale to Prejudice of Purchaser — Preservative — Notice in Shop — Preservative Injurious to Health—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 6.

The appellant, a dairyman, exhibited a notice in his shop, which could be read by any purchaser, that "all cream sold at this establishment contains a small proportion of boron preservative (not exceeding one half of 1 per cent.) to keep it sweet and wholesome, which has been the recognized method of preservation for over twenty years." A purchaser asked for and bought at the appellant's shop some cream, which upon analysis was found to contain an amount of boron preservative slightly less than that stated in the notice. The purchaser had read the notice before being supplied with the cream. Upon an information against the appellant under s. 6 of the Sale of Food and Drugs Act, 1875, for having sold to the prejudice of the purchaser cream which was not of the nature, substance, and quality of the article demanded by the purchaser, the justices convicted him, finding that the cream was injurious to health:—

Held, that, as the purchaser had notice that the cream was mixed with an ingredient, though he was not told the exact nature or effect of that ingredient, and as he chose to buy the cream so mixed, the sale was not to his prejudice within the meaning of s. 6, and the conviction was wrong. WILLIAMS *v.* FRIEND - **Div. Ct. 471**

2. —— *Milk—Written Warranty—Copy of Warranty with written Notice of Intention to rely thereon "sent" to Purchaser "within seven days" after Service of Summons—Time—Sale of Food and Drugs Act*, 1899 (62 & 63 *Vict. c.* 51), *s.* 20, *sub-s.* 1.

By s. 20, sub-s. 1, of the Sale of Food and Drugs Act, 1899, "a warranty or invoice shall not be available as a defence to any proceeding under the Sale of Food and Drugs Acts unless the defendant has, within seven days after service of the summons, sent to the purchaser a copy of such warranty or invoice with a written notice stating that he intends to rely on the warranty or invoice, and specifying the name and address of the person from whom he received it, and has also sent a like notice of his intention to such person":—

Held, that in the absence of any words in the sub-section indicating that the word "sent" is used with any other than its ordinary meaning of "dispatched" it must be construed as bearing that meaning, and that if a copy of the warranty with the written notice is posted to the purchaser within seven days from the issue of the summons it is "sent" in compliance with the requirement of the sub-section although it does not reach him till after the expiration of the seven days. RETAIL DAIRY COMPANY, LIMITED *v.* CLARKE **Div. Ct. 388**

3. —— *Sale of Food—Purchase for Analysis—Notification to Seller—Sale by Agent—Notification given to another Agent of Seller—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 14.

When an article of food has been purchased for the purpose of analysis by the public analyst, the notification of the intention to have the same analysed, required by s. 14 of the Sale of Food and Drugs Act, 1875, to be given "to the seller or his agent selling the article," may be given to an agent who has not sold the article. DAVIES *v.* BURRELL - - - - - **Div. Ct. 243**

ADVOWSON—Estate duty—Settlement estate duty—Proceeds of sale - - **192**
See REVENUE. 1.

APPEAL—County rate—County of London—City of London — To what quarter sessions appeal lies - - - **556**
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—— County rate—Parish aggrieved—Cause of appeal—Time for giving notice of appeal—Overpayment by parish - - **603**
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—— Licensing Acts—Case stated by quarter sessions — Appeal allowed by High Court with costs against licensing justices—Power to order indemnity out of local funds - - - **567**
See LICENSING ACTS. 2.

—— Licensing Acts—Refusal to renew licence—Death of licensee—Right of representative to maintain appeal - - **248**
See LICENSING ACTS. 3.

—— Poor rate—Non-payment—Issue of distress warrant — Levy — Appeal to quarter sessions—Procedure on appeal - **413**
See JUSTICES. 1.

—— Workmen's compensation—Limited company—Winding-up—Preferential payment - - - - - - **303**
See EMPLOYER AND WORKMAN. 7.

APPOINTMENT — Umpire — Appointment by Court — Originating summons — Arbitrator made respondent to summons
See ARBITRATION. **542**

ARBITRATION — *Umpire — Appointment by Court—Originating Summons—Arbitrator made Respondent to Summons—Arbitration Act*, 1889 (52 *&* 53 *Vict. c.* 49), *s.* 5.

Disputes having arisen between the buyers and sellers as to the quality of timber supplied under a written agreement of sale, the parties signed a submission to arbitration by which the questions in dispute were referred to the determination of two arbitrators, who were empowered to name an umpire. The arbitrators were duly nominated, but failed to agree upon their award; they also failed to appoint an umpire after a notice on behalf of the buyers under s. 5 of the Arbitration Act, 1889, had been served upon them. The buyers then took out an originating summons under the same section asking for the appointment of an umpire by the Court. This summons was served upon the sellers' arbitrator, but not upon the sellers themselves, as they neither resided nor carried on business within the jurisdiction of the Court. On the hearing of the summons both before the Master and the judge the sellers' arbitrator appeared and contended that there was no power to make him a respondent to the summons, and, further, that a trade expert and not a legal umpire should be appointed. The Master appointed a legal umpire, and his order was affirmed on appeal to a judge in chambers:—

Held by Vaughan Williams, Buckley, and Kennedy L.JJ., that as a general rule a summons asking for the appointment of an umpire by the Court ought to be served on the other party to

ARBITRATION—*continued.*

the arbitration and not on his arbitrator, but (hæsitante Vaughan Williams L.J.) that upon the facts of the case the sellers' arbitrator had so acted in the interest of the sellers throughout the proceedings that he ought not to be dismissed as a respondent to the originating summons.

Held, further, by Buckley and Kennedy L.JJ., that the application to the Court to appoint an umpire might properly have been made ex parte. DENNY, MOTT & DICKSON, LIMITED *v.* STANDARD EXPORT LUMBER COMPANY, LIMITED - - - **C. A. 542**

—— Award—Workmen's compensation.
See under EMPLOYER AND WORKMAN.

—— Workmen's compensation — Award — Correction—Slip—Jurisdiction - **136**
See EMPLOYER AND WORKMAN. 4.

—— Workmen's compensation—Award—Death of widow—Variation of award - **118**
See EMPLOYER AND WORKMAN. 9.

—— Workmen's compensation—Award, Form of — Temporary total incapacity — Subsequent partial incapacity - **292**
See EMPLOYER AND WORKMAN. 5.

ARBITRATOR.
See ARBITRATION.

ARREST — Extradition Treaty of 1876 with France, art. 9 — Arrest of accused—Requisition by "the diplomatic agent of his country" - - - - **578**
See EXTRADITION.

ASSIGNMENT—Deed of.
See under DEED OF ASSIGNMENT.

AUCTIONEER—*Special Property — Action for Price of Goods sold—Debt due from Owner to Purchaser—Set-off.*

The plaintiffs, a firm of auctioneers, were employed by F., a farmer and cattle dealer, to conduct sales of cattle by auction. F. being pressed by certain creditors induced them to hold their hands by giving them orders directing the plaintiffs to pay the debts, amounting to 864*l.* 11*s.* 8*d.*, out of the proceeds of an intended sale. The plaintiffs assented to this arrangement. Pending the sale the plaintiffs lent money to and did work for F. upon the terms that they should repay themselves the amount of 62*l.* 11*s.* 6*d.* out of the proceeds of the sale. The plaintiffs' commission and charges in respect of the sale amounted to 32*l.* 13*s.*

For the purposes of the sale F. bought on credit from the defendant, who was also a cattle dealer, certain cattle at the price of 164*l.* 4*s.* At the sale F. induced the defendant to bid for and buy certain cattle at the price of 195*l.* on the terms that he should be at liberty to set off the 164*l.* 4*s.* against the 195*l.* The plaintiffs had no notice of this arrangement The sale realized 987*l.* 2*s.* 6*d.*, including the price of the cattle bought by the defendant.

In an action by the plaintiffs against the defendant to recover the sum of 195*l.* the defendant as to 30*l.* 16*s.* pleaded payment. Against

AUCTIONEER—*continued.*
the balance of 164*l.* 4*s.* he claimed to set off the sum of 164*l.* 4*s.*, the price of the cattle sold by him to F. :—
Held, that as to 27*l.* 6*s.* 4*d.*, the amount by which 987*l.* 2*s.* 6*d.*, the proceeds of the sale, exceeded 959*l.* 16*s.* 2*d.*, the sum of the plaintiffs' claims against F. and the debts of F.'s creditors, the set-off was good; but bad as to the residue of the plaintiffs' claim remaining unpaid. MANLEY & SONS, LIMITED *v.* BERKETT
Bankes J. 329

AWARD.
See under ARBITRATION.

—— Workmen's compensation.
See under EMPLOYER AND WORKMAN.

BALANCE-SHEET — Company — Statement of values of "fixed assets"—Sufficiency of statement - - - - - - **354**
See COMPANY.

BALLOT—Workmen's compensation—Contracting out—Scheme of compensation—Re-certification — Ballot — Jurisdiction of county court judge - - - **26**
See EMPLOYER AND WORKMAN. 8.

BANKRUPTCY—*Act of Bankruptcy*—"*Goods held by sheriff for twenty-one days*" — *Interpleader Summons—Consent Order for Sale of Goods—Calculation of Time—Title of Trustee in Bankruptcy to Proceeds of Sale—Bankruptcy Act*, 1890 (53 *&* 54 *Vict. c.* 71), *s.* 1—*Rules of the Supreme Court*, 1883, *Order* LVII., *rr.* 1, 8, 11, 12.
The Bankruptcy Act, 1890, s. 1, enacts that a debtor commits an act of bankruptcy if his goods are seized in any civil proceeding in the High Court and are "held by the sheriff for twenty-one days," provided that where an interpleader summons is taken out in regard to the goods seized, the time elapsing between the date at which the summons is taken out and the date at which the sheriff is ordered to withdraw, or any interpleader issue ordered thereon is finally disposed of, shall not be taken into account in calculating such period of twenty-one days.
On May 20, 1911, the sheriff seized the goods of a debtor under a writ of fi. fa., and on June 9 (the twentieth day after the seizure) took out an interpleader summons which was heard on June 12, when, the third party claim being admitted, an order was made by consent that the sheriff should sell and pay the amount of the claim and his costs of the execution. The sheriff on the next day sold the goods. The debtor having become bankrupt, his trustee in bankruptcy claimed the proceeds of the sale on the ground that the debtor had committed an act of bankruptcy by reason of the sheriff having been in possession for twenty-one days :—
Held, that the words "any interpleader issue ordered thereon is finally disposed of" in the statute apply not only to cases where an issue is stated and is separately decided, but also to cases where on the hearing of the summons a decision is made which finally determines the matter in dispute; and that the words "time elapsing between" mean the time elapsing between the

BANKRUPTCY—*continued.*
date of the summons and the date of such decision.
Held, also, that in calculating the twenty-one days the whole of the period occupied by the interpleader proceedings, i.e., the four days from June 9 to June 12, both inclusive, and not merely the two days between those dates, ought not to be reckoned, and that therefore the act of bankruptcy was not committed. MASON (TRUSTEE OF CHETWYND) *v.* BOLTONS LIBRARY, LIMITED
Phillimore J. 520

2. —— *Act of Bankruptcy—Non-compliance with Bankruptcy Notice to pay Judgment Debt—Notice of Act of Bankruptcy committed by Judgment Creditor—Subsequent Adjudication of Judgment Creditor—Relation back of Trustee's Title—Invalidity of Bankruptcy Notice—Bankruptcy Act*, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*); *s.* 43.
A judgment debtor was served by his judgment creditor with a bankruptcy notice to pay the amount of the debt or secure or compound for the same. Previously to the service of the notice the judgment creditor had himself committed an act of bankruptcy in respect of which he was subsequently adjudicated bankrupt and a trustee was appointed in his bankruptcy :—
Held by Cozens-Hardy M.R. and Kennedy L.J. (Buckley L.J. dissenting), that, having regard to the relation back of his trustee's title, the judgment creditor was not in a position to issue and serve the bankruptcy notice, and that a receiving order which had been made upon the debtor in respect thereof must be discharged. *In re* A DEBTOR, NO. 211 OF 1912 - - - **C. A. 533**

3. —— *Bankruptcy Notice — Judgment in County Court—Payment into Court—Bankruptcy Notice for full amount—Execution—Practice—Bankruptcy Act*, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*)—*County Court Rules*, 1903 *and* 1904, *Order* XXIII., *r.* 13; *Order* XXV., *rr.* 8, 23A; *Appendix H, Form* 163.
Certain creditors recovered a judgment against a debtor in the county court. Before the day named in the judgment for payment of the debt the debtor paid into Court a sum in part satisfaction thereof. The judgment creditors repudiated this payment and issued a bankruptcy notice requiring the debtor to pay the judgment debt in full without making any allowance for the payment into Court :—
Held, that after the payment into Court execution could not issue for the full amount of the judgment, but only for the balance after giving credit for the amount paid into Court, and consequently that the bankruptcy notice was invalid.
In re Child [1892] 2 Q. B. 77, followed. *In re* MILLER. *Ex parte* FURNITURE AND FINE ARTS DEPOSITORIES, LIMITED - **Div. Ct. 451**

4. —— *Debtor under Arrest—Fugitive Offender—Public Examination—Questions tending to criminate—Practice — Bankruptcy Act*, 1883 (46 *&* 47 *Vict. c.* 52), *ss.* 17, 69—*Bankruptcy Act*, 1890 (53 *&* 54 *Vict. c.* 71), *ss.* 8, 27.
A debtor, who is in custody or under remand

BANKRUPTCY—*continued.*

on a criminal charge, is bound at his public examination in bankruptcy to answer all such questions touching his conduct, dealings, and property as the Court may put or allow to be put to him, even although the answers may incriminate him ; and the scope of the inquiry is not limited by ss. 17 and 69 of the Bankruptcy Act, 1883, to offences under s. 11 of the Debtors Act, 1869, or in connection with his bankruptcy, but extends to all matters which the Court may take into consideration under s. 8 of the Bankruptcy Act, 1890, on the application for his discharge.

The usual practice of not pressing such questions in relation to the alleged offence while the criminal charge is hanging over the debtor, but of adjourning the public examination until after the trial, is only a rule of convenience. *In re* ATHERTON - - - **Phillimore J. 251**

5. —— *Deed of Assignment—Key of Business Premises left with Trustee —Composition—Trustee authorized by Creditors not to enforce Deed—Key returned to Debtor—Bankruptcy of Debtor—Liability of Trustee of Deed to account to Trustee in Bankruptcy.*

A debtor assigned by deed his stock in trade and effects at his business premises to a trustee for the benefit of his creditors, and, with a view to avoid a threatened distress, left the key of the business premises at the trustee's office. The trustee valued the stock in trade and prepared a statement of affairs for a meeting of the creditors at which a composition was accepted subject to its payment being guaranteed. Satisfactory guarantees were handed to the trustee, who, with the consent of the majority of the creditors, allowed the debtor to take away the key and did not proceed under the deed of assignment. Within three months the debtor became bankrupt and had no assets :—

Held, that the trustee under the deed had intermeddled with the estate and must account for the stock in trade and pay its value to the trustee in bankruptcy. *In re* PRIGOSHEN. *Ex parte* OFFICIAL RECEIVER **Phillimore J. 494**

6. —— *Dismissal of Petition — Receiving Order made on Appeal—Relation back of Order —Transactions with Bankrupt in Interval—Protection of—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 49.

Where on appeal from the dismissal of a bankruptcy petition a receiving order is made, and the order, in accordance with the usual practice of the Court, is antedated as of the date when the petition was wrongly dismissed, for the purposes of s. 49 of the Bankruptcy Act, 1883, by which certain transactions with the bankrupt are protected provided they took place "before the date of the receiving order," the date of the receiving order is the date on which it was made and not the date which it bears. *In re* TEALE. *Ex parte* BLACKBURN **Div. Ct. 367**

7. —— *Executors carrying on Testator's Business in his Firm Name—Receiving Order against Firm — Application to adjudicate —* **BANKRUPTCY**—*continued.*

Whether Executors are Partners—Practice—Partnership Act, 1890 (53 & 54 *Vict. c.* 39), *s.* 1—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 20, 115—*Bankruptcy Rules*, 1886, *rr.* 260, 262, 264.

Executors carried on their testator's business under the powers of his will in the same firm name in which he had carried it on. Subsequently a receiving order was made against them in the firm name on a bankruptcy petition by a creditor who had recovered judgment against them in the King's Bench Division in the firm name on two dishonoured bills of exchange accepted in the firm name :—

Held, that the executors were not liable to be adjudicated bankrupt as partners. *In re* FISHER & SONS - - **Phillimore J. 491**

8. —— *Voluntary Settlement — Bankruptcy of Settlor—Sale by Voluntary Donee after Act of Bankruptcy — Purchaser for Value without Notice—Title of Trustee—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), s. 47.

Where a voluntary settlement by virtue of s. 47 of the Bankruptcy Act, 1883, becomes void as against the trustee in bankruptcy of the settlor, and the title of the trustee relates back to an act of bankruptcy committed by the settlor previous to a sale by the donee under the voluntary settlement to a purchaser for value without notice of the act of bankruptcy, such purchaser acquires no title and cannot hold the property as against the trustee in bankruptcy.

The principle of *In re Carter and Kenderdine's Contract* [1897] 1 Ch. 776, applied. *In re* HART. *Ex parte* GREEN - **Phillimore J. 257**

BANKRUPTCY RULES, 1886, rr. 260, 262, 264.
See BANKRUPTCY. 7. **491**

BUILDING—London building.
See under LONDON.

CAR—Motor car.
See under MOTOR CAR.

CASES :—

—— *Atlas Metal Co.* v. *Miller* [1898] 2 Q. B, 500.
Followed and applied. FOX *v.* CENTRAL SILKSTONE COLLIERIES, LIMITED **[1912] 2 K. B. 597**

—— *Blake* v. *Midland Ry. Co.* [1904] 1 K. B. 503.
Distinguished. POPPLE *v.* FRODINGHAM IRON AND STEEL COMPANY **[1912] 2 K. B. 141**

—— *Bristow* v. *Eastman* (1794) 1 Esp. 172
Followed. COWERN *v.* NIELD **[1912] 2 K. B. 419**

—— *Brown* v. *Crossley* [1911] 1 K. B. 603
Followed. PRINTZ *v.* SEWELL **[1912] 2 K. B. 511**

—— *Carter and Kenderdine's Contract, In re*, [1897] 1 Ch. 776.
The principle of, applied. *In re* HART. *Ex parte* GREEN - **[1912] 2 K. B. 257**

CASES—*continued.*

—— *Child, In re* - - - [1892] 2 Q. B. 77
Followed. *In re* MILLER. *Ex parte* FURNITURE AND FINE ARTS DEPOSITORIES, LIMITED - [**1912**] **2 K. B. 451**

—— *Coakley* v. *Addie & Sons* - 1909 S. C. 545
Considered and explained. POPPLE *v.* FRODINGHAM IRON AND STEEL COMPANY - - [**1912**] **2 K. B. 141**

—— *Hanley* v. *Niddrie and Benhar Coal Co.*, 1910 S. C. 875.
Considered and explained. POPPLE *v.* FRODINGHAM IRON AND STEEL COMPANY - - [**1912**] **2 K. B. 141**

—— *Liverpool and London and Globe Insurance Co.* v. *Bennett; Brice* v. *Northern Assurance Co.; Brice* v. *Ocean Accident and Guarantee Corporation* [1911] 2 K. B. 577.
Affirmed - **C. A.** [**1912**] **2 K. B. 41**

—— *Macartney* v. *Macartney* (1909) 25 Times L. R. 818.
Considered. KELSEY *v.* DOUNE [**1912**] **2 K. B. 482**

—— *Macbeth & Co.* v. *Maritime Insurance Co.* [1908] A. C. 144.
The law as laid down by the House of Lords in, is altered by s. 60, sub-s. 2 (ii.), of the Marine Insurance Act, 1906 (6 Edw. 7, c. 41). See HALL *v.* HAYMAN - - - [**1912**] **2 K. B. 5**

—— *McDonald* v. *Hughes* - [1902] 1 K. B. 94
Applied. COOKE *v.* COOPER [**1912**] **2 K. B. 248**

—— *Moore, Nettlefold & Co.* v. *Singer Manufacturing Co.* [1904] 1 K. B. 830.
Referred to. PLASYCOED COLLIERIES COMPANY *v.* PARTRIDGE, JONES & CO. [**1912**] **2 K. B. 345**

—— *Rankine* v. *Alloa Coal Co.* (1904) 41 Sc. L. R. 306; 6 F. 375.
The observations of Lord Adam in, relative to "mistake," commented upon. EGERTON *v.* MOORE [**1912**] **2 K. B. 308**

—— *Reg.* v. *London Justices* [1899] 1 Q. B. 532
Applied. REX *v.* LINDSEY JUSTICES, LINCOLNSHIRE - [**1912**] **2 K. B. 413**

—— *Rex* v. *Bridgwater* - [1905] 1 K. B. 131
Considered. REX *v.* HUDSON [**1912**] **2 K. B. 464**

—— *Rex* v. *Preston* - [1909] 1 K. B. 568
Considered. REX *v.* HUDSON [**1912**] **2 K. B. 464**

—— *Rex* v. *Templer, Ex parte Howarth* [1912] 1 K. B. 351.
Affirmed - - [**1912**] **2 K. B. 444**

—— *Rex* v. *Westfall* (1912) 7 Cr. App. Rep. 176.
Considered. REX *v.* HUDSON [**1912**] **2 K. B. 464**

—— *Shrapnel* v. *Laing* - (1888) 20 Q. B. D. 334
Followed and applied. FOX *v.* CENTRAL SILKSTONE COLLIERIES, LIMITED [**1912**] **2 K. B. 597**

CASES—*continued.*

—— *Swansea Improvements and Tramway Co.* v. *Swansea Urban Sanitary Authority* [1892] 1 Q. B. 357.
Overruled. METROPOLITAN ELECTRIC TRAMWAYS, LIMITED *v.* TOTTENHAM URBAN DISTRICT COUNCIL [**1912**] **2 K. B. 216**

—— *Tomalin* v. *S. Pearson & Son, Ld.* [1909] 2 K. B. 61.
Followed. SCHWARTZ *v.* INDIA RUBBER, GUTTA PERCHA AND TELEGRAPH WORKS COMPANY - [**1912**] **2 K. B. 299**

—— *Wolfe* v. *De Braam* - (1899) 81 L. T. 533
Considered. KELSEY *v.* DOUNE [**1912**] **2 K. B. 482**

CERTIORARI—Transferred action—Title to franchise—Jurisdiction—"Action commenced in the county court" - **398**
See COUNTY COURT. 4.

CLUB—Income tax—Fees received from visitors
See REVENUE. 2. **177**

—— requiring registration — "Unregistered club"—Club struck off register—Re-registration of same club - - **425**
See LICENSING ACTS. 1.

COMPANY—*Public Company—Annual List and Summary forwarded to Registrar of Companies—Balance-Sheet—Statement of Values of "Fixed Assets"—Sufficiency of Statement—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 26, *sub-s.* 3.

The Companies (Consolidation) Act, 1908, by s. 26, sub-s. 4, requires a public company to forward annually to the Registrar of Companies a "statement . . . . in the form of a balance sheet . . . . containing a summary of its . . . . assets, giving such particulars as will disclose the general nature of those . . . . assets, and how the values of the fixed assets have been arrived at."

The respondents, a public company, forwarded to the registrar a balance-sheet, purporting to be in compliance with s. 26, which, in the statement of assets, set out the following particulars: — "Goodwill, trade marks, machinery, furniture, and fixtures: 100,000*l*. Goodwill and trade marks at the sum at which they were taken over by the company. Machinery, furniture, and fixtures at cost, less depreciation":—

Held, that this balance-sheet did not comply with the requirements of s. 26, sub-s. 4; by Lord Alverstone C.J., because it stated that different parts of the fixed assets had been valued in different ways and did not state the separate values of those parts; by Pickford J., because it ought to state the separate values of the tangible and intangible fixed assets. GALLOWAY *v.* SCHILL, SEEBOHM & CO., LIMITED **Div. Ct. 354**

—— Income tax — Foreign investments — Interest of, not remitted home — Objects of the company—Adventures
See REVENUE. 3. **41**

COMPANY—*continued.*

—— Workmen's compensation—Limited company—Winding-up—Liquidator—Preferential payment - - - **303**
See EMPLOYER AND WORKMAN. 7.

COMPENSATION—Workmen's compensation.
See under EMPLOYER AND WORKMAN.

CONTRACT — *Infancy — Infant Trader, Goods supplied by—Failure of Consideration—Money had and received—Liability of Infant—Cause of Action ex delicto.*

Where an infant trader enters into a contract for the sale of goods and is paid the price by the purchaser, but subsequently fails to deliver the goods, the purchaser cannot recover the price in an action for money had and received, even though the contract was for the infant's benefit, unless it can be proved that in substance the cause of action arose ex delicto.

Bristow v. *Eastman* (1794) 1 Esp. 172, followed. COWERN *v.* NIELD - **Div. Ct. 419**

—— Vendor and purchaser.
See under VENDOR AND PURCHASER.

CONTRIBUTION—Workmen's compensation—Industrial disease - - - **124**
See EMPLOYER AND WORKMAN. 11.

CONVERSION—Distress for rent—Purchase by landlord of goods distrained—Subsequent user of goods by landlord - **345**
See LANDLORD AND TENANT.

CONVICTION—Criminal law.
See under CRIMINAL LAW.

CORRECTION — Workmen's compensation—Award—Slip—Jurisdiction - - **136**
See EMPLOYER AND WORKMAN. 4.

COSTS—Licensing Acts.
See under LICENSING ACTS.

—— Taxation of costs—Claim and counter-claim—Both parties successful—Brief fee - - - - - - - **597**
See COUNTY COURT. 1.

COUNTY COURT—*Costs—Taxation of Costs—Claim and Counter-claim—Both Parties successful—Brief Fee—Practice—County Court Rules*, 1903, *Order LIII., r.* 16.

In an action in a county court the defendants contested the claim and counterclaimed. Judgment was given for the plaintiff on the claim for 25*l.* and costs, and for the defendants on the counter-claim for 26*l.* and costs. On taxation of the costs of the claim the registrar allowed a brief fee of three guineas, being the maximum fee according to the scale applicable to the amount recovered. No objection was taken by the defendants to this allowance. On taxation of the costs of the counter-claim the registrar also allowed a brief fee of three guineas. An objection by the plaintiff that the scale only authorized the allowance of one brief fee and that the maximum fee having been allowed on the claim no brief fee could in the circumstances be allowed on the counter-claim was overruled by the county court judge. On appeal to the Divisional Court:—

Held, that the fact that the maximum brief fee had been allowed in respect of the claim did not prevent the allowance of a brief fee for the counter-claim, but that the fee must be apportioned between the defence and the counter-claim, and only that part which was referable to the counter-claim could be allowed.

Shrapnel v. *Laing* (1888) 20 Q. B. D. 334, and *Atlas Metal Co.* v. *Miller* [1898] 2 Q. B. 500, followed and applied. FOX *v.* CENTRAL SILKSTONE COLLIERIES, LIMITED - **Div. Ct. 597**.

2. —— *Hearing before Registrar—Mistake of Law—Power of County Court Judge to order a New Trial—Practice—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 92, 93.

Where the registrar of a county court has, in the exercise of the jurisdiction given by s. 92 of the County Courts Act, 1888, heard and determined a disputed claim, the county court judge has power under s. 93 to order a new trial if the registrar's decision was wrong in law. ROSIN *v.* JOSEPH RANK, LIMITED - **Div. Ct. 528**

3. —— *Interpleader—Judgment for a Debt—Execution and Sale of Goods of Judgment Debtor—Claim by Assignee of the Debt to Proceeds of Sale—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 156, 157.

Where a creditor, who has assigned a debt together with all securities for the same, subsequently recovers judgment against his debtor in the county court and the goods of the judgment debtor are taken in execution and sold, the assignee of the debt cannot claim the proceeds of sale under ss. 156 and 157 of the County Courts Act, 1888. PLANT *v.* COLLINS. DEELEY, CLAIMANT - - - - - **Div. Ct. 459**

4. —— *Practice—Transferred Action—Title to Franchise—Jurisdiction—Certiorari—"Action commenced in the county court"—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 56, 69, 114, 124, 126.

By s. 126 of the County Courts Act, 1888, the High Court or a judge thereof may order the removal into the High Court by writ of certiorari or otherwise of any action or matter commenced in the county court under the provisions of the Act.

A writ having been issued in the Chancery Division of the High Court for an injunction to restrain disturbance of a ferry, the judge in the Chancery Division, on an interlocutory application for an interim injunction, ordered the action to be transferred to the county court under s. 69 of the County Courts Act.

By s. 56 of the Act it is provided that except as in the Act provided the county court shall not have cognizance of any action in which the title to any franchise shall be in question. During the proceedings in the county court it became apparent that the title to the ferry was in question. An application was accordingly made under s. 126 of the Act to remove the action into the High Court:—

Held, that the action was "commenced in the county court" within the meaning of that

COUNTY COURT—*continued.*
section, and that the High Court had jurisdiction to make the order. GENERAL ESTATES COMPANY *v.* BEAVER - - - - **Div. Ct. 398**

—— Bankruptcy notice—Judgment in county court — Payment into Court — Bankruptcy notice for full amonnt—Execution - - - - - - - **451**
See BANKRUPTCY. 3.

—— Workmen's compensation—Jurisdiction of county court judge - - - **26**
See EMPLOYER AND WORKMAN. 8.

COUNTY COURT RULES, 1903 and 1904:—

—— **Order XXIII., r. 13** - - - - **451**
See BANKRUPTCY. 3.

—— **Order XXV., rr. 8, 23a, Appendix H, Form 163** - - - - - **451**
See BANKRUPTCY. 3.

—— **Order LIII., r. 16** - - - - **597**
See COUNTY COURT. 1.

COUNTY RATES ACT, 1852 - - - **603**
See RATES. 1.

CREAM—Adulteration - - - - **471**
See ADULTERATION. 1.

CRIMINAL LAW — *Evidence—Admissibility—Living on Earnings of Prostitution—Prostitution of Wife—Evidence of Wife—Vagrancy Act*, 1898 (61 & 62 *Vict. c.* 39), *s.* 1.

The defendant was charged before a Court of summary jurisdiction under s. 1 of the Vagrancy Act, 1898, with knowingly living wholly or in part on the earnings of prostitution. The person on the earnings of whose prostitution he was alleged to be living was his wife, and the prosecution was commenced by her:—

Held by Pickford and Avory JJ. (Lush J. dissenting), that the wife was not an admissible witness for the prosecution. DIRECTOR OF PUBLIC PROSECUTIONS *v.* BLADY - **Div. Ct. 89**

2. —— *Evidence—Prisoner called as Witness—Questions as to Previous Conviction—Imputations on Character of Witnesses for Prosecution—Criminal Evidence Act*, 1898 (61 & 62 *Vict. c.* 36), *s.* 1.

In s. 1 of the Criminal Evidence Act, 1898, which provides that a person charged with an offence and called as a witness shall not be asked any questions tending to shew that he has committed or been charged with or convicted of any other offence, the words of sub-s. (*f*) (ii.), "unless the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution," must receive their ordinary and natural interpretation and must not be qualified by adding or inserting the words "unnecessarily," or "unjustifiably," or "for purposes other than that of developing the defence," or other similar words.

The appellant was charged with having stolen money and a bank book from the prosecutor in a public-house; the appellant and several other men were present at the time of the theft, and the bank book was found in the appellant's pocket. The defence set up was that one or more of the other men had committed the theft and had put the bank book into the appellant's pocket, and when two of these men were called as witnesses for the prosecution they were asked questions by the appellant's counsel with a view to shew that they had committed the theft. The appellant was called as a witness for the defence and, without objection by his counsel, was asked questions by counsel for the prosecution as to a previous conviction:—

Held, that the nature and conduct of the defence were such as to involve imputations on the character of witnesses for the prosecution, within s. 1 (*f*) (ii.) of the Criminal Evidence Act, 1898, and that therefore the accused could be cross-examined as to previous convictions.

Rex v. *Bridgwater* [1905] 1 K. B. 131, *Rex* v. *Preston* [1909] 1 K. B. 568, and *Rex* v. *Westfall* (1912) 7 Cr. App. Rep. 176, considered. REX *v.* HUDSON - - - - **C. C. A. 464**

—— Bankruptcy—Debtor under arrest—Fugitive offender — Public examination — Questions tending to criminate—Practice - - - - - - **251**
See BANKRUPTCY. 4.

—— Conviction (Summary) — Rehearing — Unsworn evidence at first hearing—Jurisdiction to rehear case - - - **362**
See JUSTICES. 2.

—— Extradition Treaty of 1876 with France, art. 9 — Arrest of accused — Requisition by "the diplomatic agent of his country" - - - - - **578**
See EXTRADITION.

—— Justices.
See under JUSTICES.

DAMAGE—Railway—Fire caused by sparks from engine—"Particulars of damage" **406**
See RAILWAY. 1.

DANGEROUS STRUCTURES—London Building Acts—Power of London County Council to shore up - - - - - **504**
See LONDON. 1.

DEBT—Action for price of goods sold—Debt due from owner to purchaser—Set-off **329**
See AUCTIONEER.

—— Interpleader—Judgment for a debt—Execution and sale of goods of judgment debtor—Claim by assignee of the debt to proceeds of sale - - - **459**
See COUNTY COURT. 3.

DEDICATION—Highway.
See under HIGHWAY.

DEED OF ASSIGNMENT—Liability of trustee of deed to account to trustee in bankruptcy - - - - - **494**
See BANKRUPTCY. 5.

DEPENDANTS — Workmen's compensation — Award — Apportionment — Change of circumstances — Death of widow — Variation of award - - - **118**
See EMPLOYER AND WORKMAN. 9.

—— Workmen's compensation—Sole dependant illegitimate child - - - **323**
See EMPLOYER AND WORKMAN. 12.

—— Workmen's compensation—Statements of deceased before claim made - **317**
See EMPLOYER AND WORKMAN. 10.

DISEASE — Workmen's compensation — Industrial disease - - - - - **124**
See EMPLOYER AND WORKMAN. 11.

DISTRESS — Purchase by landlord of goods distrained—Subsequent user of goods by landlord—Conversion - - - **345**
See LANDLORD AND TENANT.

DOCK — Insurance (Marine) — Concealment — Floating dock — "Seaworthiness admitted" - - - - - - **112**
See INSURANCE (MARINE). 1.

EMPLOYER AND WORKMAN — *Compensation — Agreement — Course of the Employment — Area of Employment — Special Agreement — Strike — Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A workman employed as a storekeeper in Manchester acted as carter for his employer at a time when the carters of Manchester were on strike, under a special contract by which the employer agreed to be responsible for any injury which he might sustain. He was on his way home from work and was passing through a market place about seven minutes' walk from his employer's premises, when he was attacked by strikers and seriously injured :—

Held, that the agreement while enlarging the liability of the employer could not bring within the operation of the Workmen's Compensation Act, 1906, an accident which was not in the course of the workman's employment, and that an award of compensation under the Act could not be maintained. POULTON *v.* KELSALL - - - - - - **C. A. 131**

2. —— *Compensation — Agreement for Payment of Lump Sum — Registration — Injury occasioned by Accident — Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *Sched. II.*, *cl.* 10.

There is nothing in the Workmen's Compensation Act, 1906, to prevent an adult workman before entering a claim for an award and before any payment of a weekly sum has been made to him from coming to an arrangement by way of compromise with his employer to accept a lump sum in satisfaction of all claims in respect of an injury occasioned by an accident which has happened to him whilst in the employer's service, and such agreement, if entered into, will be valid although not registered under the Act.

Clause 10 of Sched. II. presupposes that a weekly payment has been made which but for

EMPLOYER AND WORKMAN — *continued.*

the existence of the agreement to pay a lump sum would have continued, and has no application to a case where no weekly payment has ever in fact been made. RYAN *v.* HARTLEY **C. A. 150**

3. —— *Compensation — Agreement to pay Weekly Sum during Total Incapacity — Record of Memorandum — Cesser of Total Incapacity — Spent Agreement — Registration — Accident arising out of and in the Course of Employment — Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 3; *Sched. I.* (1.), (16.); *Sched. II.* (9.).

Where an agreement has been entered into between an employer and a workman, who has been injured by an accident arising out of and in the course of his employment, for the payment of weekly compensation from the date of the accident and to continue during total incapacity for work, the Court will not direct a memorandum of the agreement to be recorded if at the date of the application to register the total incapacity has ceased.

Blake v. *Midland Ry. Co.* [1904] 1 K. B. 503, distinguished.

Coakley v. *Addie & Sons*, 1909 S. C. 545, and *Hanley* v. *Niddrie and Benhar Coal Co.*, 1910 S. C. 875, considered and explained. POPPLE *v.* FRODINGHAM IRON AND STEEL COMPANY - - - - - - **C. A. 141**

4. —— *Compensation — Award — Correction — Slip — Jurisdiction — Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58) — *Workmen's Compensation Rules*, 1907—1911, *r.* 28 (1.), (2.).

A county court judge has no power to alter his award after it has been signed and sealed unless there has been an accidental slip or omission within r. 28 (2.) of the Workmen's Compensation Rules, 1907—1911.

A workman having sustained personal injury by accident arising out of and in the course of his employment, an agreement for compensation by his employers was recorded. The employers having applied for the review, termination, or diminution of the weekly sum payable to the workman, the county court judge reduced the compensation and directed that the employers should pay the costs. After the Court rose he added a note that on further consideration he directed the award to be without costs, and his signature was placed after that note. In the award as drawn up no costs were awarded to either party. The workman applied that the award might be corrected under r. 28 (2.) of the Workmen's Compensation Rules, 1907—1911, by awarding costs to him, on the ground that the award as drawn up differed from that made by the judge at the hearing :—

Held, that the judge had power to alter his award until it was signed and sealed within r. 28 (1.), but not afterwards. JOHN MOWLEM & CO. *v.* DUNNE - - - - **C. A. 136**

5. —— *Compensation — Award — Weekly Payment — Injury by Accident — Temporary Total Incapacity — Subsequent Partial Incapacity — Form of Award — Workmen's Compensation Rules*,

EMPLOYER AND WORKMAN—*continued.*

1907, *Appendix, Form* 24—*Intra vires—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I.* (16.).

In all ordinary cases under the Workmen's Compensation Act, 1906, where a workman has sustained an injury by accident arising out of and in the course of his employment, resulting in his total incapacity for the time being, and entitling him to a weekly payment by way of compensation, the arbitrator ought to make his award in accordance with Form 24 in the Appendix to the Workmen's Compensation Rules, 1907, ordering the weekly payments to continue during the total or partial incapacity of the claimant for work, or until the payments shall be ended, diminished, increased, or redeemed in accordance with the Act.

Form 24 is intra vires and entirely consistent with the policy of the Act. HIGGINS *v.* POULSON C. A. 292

6. —— *Compensation—Committee representative of Employer and Workmen—Award—Application to Review—Notice of Objection to Committee—Jurisdiction of County Court—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Sched. I., par.* 12 ; *Sched. II., par.* 1.

Where a committee, representative of an employer and his workmen, acting under paragraph 1 of the Second Schedule to the Workmen's Compensation Act, 1897, have decided the amount to be paid weekly to a workman as compensation for an accident, and the workman subsequently desires that the weekly payment may be reviewed, and gives due notice that he objects to the committee holding an arbitration with respect to the review, a county court judge has jurisdiction to hear and determine the application to review.

So *held*, affirming the decision of a Divisional Court (Lord Alverstone C.J., Hamilton J., and Bankes J.), [1912] 1 K. B. 351. THE KING *v.* TEMPLER. *Ex parte* HOWARTH - C. A. 444

7. —— *Compensation—Company—Limited Company—Winding-up—Liquidator—Sum for which Weekly Payment redeemable—Preferential Payment—Order for Payment—Appeal—Jurisdiction—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 5.

A workman alleged to have been employed by a company applied under the Workmen's Compensation Act, 1906, s. 5, for arbitration on the question whether the receiver appointed on behalf of debenture-holders of the company and the liquidator under its voluntary liquidation were liable to pay him as a preferential payment the sum for which a weekly payment of 16*s.* 3*d.* awarded to him before the winding-up could be redeemed, and as to the amount of such payment. The county court judge made an order for the payment by the receiver and liquidator of a lump sum to the workman :—

Held, that any question whether this sum was to be paid as a preferential payment was not the subject of an appeal under the Workmen's Compensation Act, but must be decided in the winding-up.

Quære, per Cozens-Hardy M.R. and Farwell L.J., whether the county court judge had jurisdiction under s. 5 to make the order for payment of the amount. HOMER *v.* GOUGH C. A. 303

8. —— *Compensation—Contracting out—Scheme of Compensation—Re-certification—Ballot—Jurisdiction of County Court Judge—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 3, *sub-s.* 1 ; *s.* 15, *sub-ss.* 2 *and* 3.

On re-certification under s. 15 of the Workmen's Compensation Act, 1906, of a scheme of compensation which has been certified under the Workmen's Compensation Act, 1897, it is not necessary that a ballot of the workmen should be taken before the registrar can re-certify.

The applicant had been employed in the Portsmouth Dockyard as a bricklayer for about twenty years, and in May, 1908, in the course of his employment he met with an accident which resulted in January, 1910, in his being returned unfit for service. He was dissatisfied with the compensation offered by the respondents and applied to the county court to settle the amount. The respondents answered that he had contracted with them to be bound by a scheme of compensation certified and re-certified by the Registrar of Friendly Societies, by which compensation was to be fixed by the Treasury ; and they contended that the county court judge had no jurisdiction to hear the application. It was admitted that there had not been any ballot of workmen in the respondents' employment prior to the re-certification of the scheme ; and the applicant contended that on that ground the certificate was invalid :—

Held (by Cozens-Hardy M.R. and Farwell L.J., Fletcher Moulton L.J. dissenting), that it was not necessary that a ballot should be taken before the registrar could re-certify ; that the certificate was valid and the applicant was bound by the scheme ; and that the county court judge had no jurisdiction to hear the application. GODWIN *v.* LORDS COMMISSIONERS OF THE ADMIRALTY - - - C. A. 26

9. —— *Compensation—Dependants—Death of Workman—Award—Apportionment—Change of Circumstances—Death of Widow—Variation of Award—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I.* (9.)—*Workmen's Compensation Rules*, 1907—1911, *r.* 58.

A workman having met with a fatal accident, the arbitrators under the Workmen's Compensation Act, 1906, awarded 292*l.* 1*s.* 7*d.* compensation to his dependants, his widow and four younger children, in certain proportions, of which the widow was to receive 102*l.* 1*s.* 7*d.* The money was ordered to be paid to trustees and fortnightly payments were made to the widow. She died intestate leaving 72*l.* 18*s.* 2*d.* in the hands of the trustees representing the unexhausted part of her share of the compensation. Her next of kin claimed the money on the ground that it was vested in her and undisposed of. Two of the dependent children applied to the arbitrators for an order under Sched. I., paragraph 9, of the Act for the variation of the award and an order that the

EMPLOYER AND WORKMAN—*continued.*

72*l.* 18*s.* 2*d.* should be apportioned between them :—

Held, that the circumstances of the applicants had been varied by the death of the widow; that paragraph 9 applied to cases where a dependant had died; and that the arbitrators had power to vary the award. IVEY *v.* IVEY - - - - - - **C. A. 118**

10. —— *Compensation—Dependants—Death resulting from Accident—Claim of Dependants—Cause of Injury—Statements of Deceased before Claim made—Admissions—Declarations against Interest — Inadmissibility—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58).

Statements made by a deceased workman, a blacksmith, to the general manager of his employers as to the nature and cause of an injury to his thumb which ultimately resulted in his death—

Held not admissible on behalf of the employers in an application by the deceased's dependants for compensation under the Workmen's Compensation Act, 1906, as admissions by the deceased, inasmuch as the applicants had, as dependants, a direct statutory right against the employers under Sched. I. (1.) (*a*); the deceased workman was not a party to the litigation; and the applicants did not derive their title to compensation by derivation from him.

The statements were to the effect that in answer to the manager's question what was the matter with his thumb the deceased replied that he had a whitlow on his thumb, and in reply to a further question whether he had been hammering his thumb the deceased replied "No."

Held, further, that the statements were not admissible as declarations against interest, inasmuch as it must be shewn that the statements were to the knowledge of the deceased contrary to his pecuniary interests, and the statements in question did not satisfy that requirement, for when they were made no claim had been put forward nor was there any reason to believe that the workman knew that he ever would be able to make a claim. Moreover the particular statements in question were not necessarily against the interests of the deceased, for neither of them was of such a nature as to be inimical to, or to militate against the success of, a claim on his part, if he had lived to make one. TUCKER *v.* OLDBURY URBAN DISTRICT COUNCIL - - - - - - **C. A. 317**

11. —— *Compensation—Industrial Disease—Gradual Process — Former Employer — Contribution — Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 8, *sub-s.* 1 (*c*) (iii.).

The claimant, a workman in the employment of the defendants, applied to the county court judge to settle the compensation to which he was entitled under the Workmen's Compensation Act, 1906, in respect of mercurial poisoning alleged to have been contracted by him whilst in the service of the defendants. The defendants disputed their liability and also served a third party notice for contribution under s. 8, sub-s. 1 (*c*) (iii.), on previous employers of the

EMPLOYER AND WORKMAN—*continued.*

claimant by whom he had been employed within the twelve months previous to the date of his disablement. The judge awarded compensation and dismissed the third party notice on the ground that the defendants had failed to prove that the claimant's disease was in fact contracted whilst he was in the service of the previous employers :—

Held, that this was an application for contribution under s. 8, sub-s. 1 (*c*) (iii.), not an application under s. 8, sub-s. 1 (*c*) (ii.), to join another employer as defendant, and that there was no obligation on the appellants to prove that the disease was contracted whilst the claimant was in the service of the previous employers. MALLINDER *v.* J. MOORES & SONS, LIMITED - - - - - - **C. A. 124**

12. —— *Compensation—Negligence of Persons other than Employer — Sole Dependant Illegitimate Child—Payment of Compensation by Employer—Right of Indemnity against Persons causing Injury—Injury resulting in Death of Workman—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 6.

By s. 6 of the Workmen's Compensation Act, 1906, "Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof,—(1.) The workman may take proceedings both against that person to recover damages and against any person liable to pay compensation under this Act for such compensation, but shall not be entitled to recover both damages and compensation; and (2.) if the workman has recovered compensation under this Act the person by whom the compensation was paid . . . . shall be entitled to be indemnified by the person so liable to pay damages as aforesaid."

A workman while working in the employment of the plaintiffs sustained injuries from which a few days later he died. The injuries were caused by the negligence of the defendants' servants. The workman left as his sole dependant an illegitimate daughter. The plaintiffs having paid her compensation under the Workmen's Compensation Act, 1906, sued the defendants under s. 6 of that Act for an indemnity in respect of the compensation so paid by them. For the defendants it was contended that, as no action could be maintained under Lord Campbell's Act for the benefit of the illegitimate daughter, s. 6 did not apply :—

Held, that the provisions of that section did not require that the person recovering the compensation and the person to whom the wrongdoer was liable to pay damages should be the same person; that as there was an interval of time between the infliction of the injury and the death of the workman there was during that time a legal liability to pay damages to him; that the fact of the liability so created being subsequently abated by his death did not prevent the application of the section; and that the plaintiffs were entitled to recover. SMITH'S DOCK COMPANY *v.* JOHN READHEAD & SONS **Bray J. 323**

EMPLOYER AND WORKMAN—*continued.*

13. —— *Compensation—Notice of Accident—Twelve Months' Delay—Latent Injury—Employer prejudiced in Defence—"Mistake or other reasonable cause"—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 2, *sub-s.* 1.

A workman who seeks to obtain the benefit of the proviso to sub-s. 1 of s. 2 of the Workmen's Compensation Act, 1906, in respect of failure to give notice of the accident as soon as practicable after the happening thereof, must prove affirmatively that the employer has not been prejudiced thereby, otherwise the circumstances may be such as to lead the Court to conclude that the mere lapse of time must necessarily have prejudiced the employer in his defence.

A workman who has sustained an injury of such a latent nature that he does not know for some time whether it will have any serious result may make a mistake of fact, within the meaning of "mistake" in the proviso to sub-s. 1 of s. 2 of the Act, in not giving notice as soon as practicable after the happening of the accident, but so soon as he realizes that he is suffering from some ailment upon which he may have occasion to rely as a consequence of the accident, he should give notice to his employer, and his failure so to do, even though it proceed from a desire to do the best for himself or his employer, will not amount to "mistake or other reasonable cause" within the proviso to the sub-section.

The meaning of "mistake" discussed.

The observations of Lord Adam in *Rankine* v. *Alloa Coal Co.* (1904) 41 Sc. L. R. 306; 6 F. 375, relative to "mistake" commented upon. EGERTON *v.* MOORE - - - - **C. A. 308**

14. —— *Compensation — Ship — Death on High Seas—British Ship—Territorial Limits of United Kingdom — Jurisdiction — Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 7.

A workman employed by the defendants was directed to proceed at their expense, in a British ship, to Teneriffe to do work upon electric cables there. The ship foundered in the Bay of Biscay and the workman and all on board were lost. His dependants applied for compensation:—

Held, that the Workmen's Compensation Act, 1906, had no application to British ships on the high seas except in the case of seamen and apprentices within s. 7.

Tomalin v. *S. Pearson & Son, Ld.* [1909] 2 K. B. 61, followed. SCHWARTZ *v.* INDIA RUBBER, GUTTA PERCHA AND TELEGRAPH WORKS COMPANY - - - - **C. A. 299**

15. —— *Compensation — Ship — Intoxicated Sailor — Absence from Ship without Leave — Return to Duty—Accident arising out of and in the Course of Employment—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A sailor went ashore without leave on the evening before his ship was due to sail from the port where she was lying. He remained ashore all night. The next morning, the ship's gangways having been taken in, the mooring ropes cast off, and the vessel being still alongside, the

EMPLOYER AND WORKMAN—*continued.*

sailor returned and was pushed on board in a helpless state of intoxication by two persons who helped him along the quay. He reached the deck on his hands and knees and lay there for a minute or two while the ship was gradually moving away from the quayside. He then attempted to get up, staggered backwards, fell overboard, and was drowned.

Upon a claim for compensation under the Workmen's Compensation Act, 1906, the county court judge held that, the sailor having regained his ship, the accident arose out of and in the course of his employment, and he awarded compensation:—

Held, on appeal, that the sailor had not regained his ship in a condition to perform his duties. The accident was due solely to his intoxication and did not arise out of his employment. FRITH *v.* OWNERS OF S.S. "LOUISIANIAN" - - - - **C. A. 155**

ESTATE DUTY.
See under REVENUE.

EVIDENCE—Bankruptcy—Debtor under arrest—Fugitive offender—Public examination—Questions tending to criminate—Practice - - - - - **251**
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—— Criminal law.
See under CRIMINAL LAW.

—— Workmen's compensation—Statements of deceased before claim made—Admissions—Declarations against interest **317**
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EXAMINATION.
See under EVIDENCE.

EXECUTION — Interpleader — Judgment for a debt—Execution and sale of goods of judgment debtor—Claim by assignee of the debt to proceeds of sale - - **459**
See COUNTY COURT. 3.

—— Judgment in county court—Payment into Court — Bankruptcy notice for full amount - - - - - **451**
See BANKRUPTCY. 3.

EXECUTOR—Executors carrying on testator's business in his firm name—Receiving order—Whether executors are partners
See BANKRUPTCY. 7. **491**

EXTRADITION—*Requisition for Surrender—Arrest of Accused—Requisition by "the diplomatic agent of his country"—Extradition Treaty of* 1876 *with France, art.* 9.

By art. 9 of the Extradition Treaty of 1876 between the United Kingdom and France a fugitive criminal may be apprehended under a warrant issued by a magistrate on such information or complaint and such evidence or after such proceedings as would, in the opinion of the person issuing the warrant, justify the issue of a warrant if the crime had been committed where the magistrate exercises jurisdiction; and the accused "shall be discharged, as well in the United Kingdom as in

EXTRADITION—*continued.*
France, if within fourteen days a requisition shall not have been made for his surrender by the diplomatic agent of his country." Under the Extradition Treaty of 1908 each country may allow the extradition of its own nationals.

In proceedings under art. 9 of the treaty of 1876 to obtain the extradition of a British subject charged with having committed a crime in France, it was objected that no requisition had been made for his surrender by the diplomatic agent of the United Kingdom :—

Held, that "the diplomatic agent of his country" meant the diplomatic agent of the country within whose jurisdiction the accused was when he committed the crime charged against him and which demanded his extradition, and that therefore a requisition for his surrender by the diplomatic agent of this country was not necessary. THE KING *v.* GOVERNOR OF BRIXTON PRISON. THE KING *v.* GOVERNOR OF HOLLOWAY PRISON
Div. Ct. 578

EXTRADITION TREATY OF 1876 WITH FRANCE, Art. 9. - - - - - **578**
See EXTRADITION.

FINANCE ACTS.
See under REVENUE.

FIRE—Railway—Fire caused by sparks from engine—Damage to agricultural crops—"Particulars of damage" - - **406**
See RAILWAY. 1.

FOOD AND DRUGS—Sale of.
See under ADULTERATION.

FOREIGN INVESTMENTS—Income tax—Company—Interest of, not remitted home—Objects of the company - - **41**
See REVENUE. 3.

FRANCE — Extradition Treaty of 1876 with France, art. 9 - - - - **578**
See EXTRADITION.

FRAUDS, STATUTE OF—Sale of land—Contract in writing — Signature of purchaser's name — Sufficiency of description — Correspondence - - - - **373**
See VENDOR AND PURCHASER.

FUGITIVE OFFENDER — Bankruptcy—Debtor under arrest — Public examination — Questions tending to criminate - **251**
See BANKRUPTCY. 4.

FURNITURE—School—Power and duty of local education authority to provide furniture
See SCHOOLS. **161**

GAMING—*Lottery—Purchase of Chance—Gift of Prize—Money paid by Purchaser of Chance not used for Purchase of Prize—Gaming Act* 1802 (42 *Geo.* 3, *c.* 119), *s.* 2—*Lotteries Act*, 1823 (4 *Geo.* 4, *c.* 60), *s.* 41.

Tickets each bearing a different number were sold for 6*d.* each upon the terms that the purchaser of the ticket bearing a number to be subsequently drawn by an independent person should be entitled to a bicycle as a prize. The bicycle was presented as a gift by a firm of cycle manufacturers for the purposes of advertisement, no part of the money paid by the purchasers of the tickets being used for acquiring the bicycle :—

Held, that as each purchaser of a ticket bought a chance, and the holder of the ticket bearing the winning number was determined by chance, the scheme constituted a lottery within the meaning of the Lotteries Act, 1823, s. 41, and it was immaterial that no part of the money paid by the purchasers of the tickets was used for the purchase of the prize. BARTLETT *v.* PARKER - - - - - - **Div. Ct. 497**

GOODS—Sale of.
See under SALE OF GOODS.

HIGHWAY—*Way becoming a Highway after* 1835 — *Absence of Intentional Dedication by Owner—Non-compliance with Conditions of s.* 23 *of the Highway Act*, 1835 (5 *& 6 Will.* 4, *c.* 50)—*Whether Way repairable by Inhabitants at large.*

The provisions of s. 23 of the Highway Act, 1835, with respect to the repair of new highways are not confined in their application to highways which have become such as the result of intentional dedication by the owner of the soil.

At some date subsequent to 1835 a way, which had previously been set out in an inclosure award as a private bridle path, became a public highway, but there was no evidence to shew at what precise date, or how, or under what circumstances it became such. In the absence of evidence that the conditions of s. 23 of the Highway Act, 1835, had been satisfied :—

Held, that the way was not repairable by the inhabitants at large. CABABÉ *v.* WALTON-UPON-THAMES DISTRICT COUNCIL - **Div. Ct. 432**

INCOME TAX—Inland Revenue.
See under REVENUE.

INDEMNITY—Workmen's compensation - **323**
See EMPLOYER AND WORKMAN. 12.

INDUSTRIAL DISEASE — Workmen's compensation - - - - - - **124**
See EMPLOYER AND WORKMAN. 11.

INFANT — Infancy — Infant trader, Goods supplied by—Failure of consideration—Money had and received—Liability of infant - - - - - - - **419**
See CONTRACT.

INSURANCE (MARINE)—*Concealment—Floating Dock—"Seaworthiness admitted."*

The owners of a floating dock insured it against loss on a voyage by sea, the policy containing the words "seaworthiness admitted." The dock was in sound condition as a dock, but in order to make it seaworthy for a voyage it required specially strengthening. It was not in fact so strengthened, the owners believing that such strengthening was unnecessary and that it was capable of being safely towed to its destination without it :—

Held, that the underwriters, who knew that

INSURANCE (MARINE)—*continued.*
the subject-matter of the insurance was a floating dock and therefore not an ordinary sea-going vessel, were by reason of the admission of seaworthiness put on inquiry as to its construction, and that the owners were not bound to disclose the want of special strengthening. CANTIERE MECCANICO BRINDISINO *v.* JANSON
Scrutton J. 112

2. —— *Constructive Total Loss—Policy on Ship—Cost of Repair—Value of Wreck—Marine Insurance Act*, 1906 (6 *Edw.* 7, *c.* 41), *s.* 60.
The law as laid down by the House of Lords in *Macbeth & Co.* v. *Maritime Insurance Co.* [1908] A. C. 144, is altered by s. 60, sub-s. 2 (ii.), of the Marine Insurance Act, 1906. In determining whether a ship, which is seriously damaged by perils insured against, can be treated as a constructive total loss within the meaning of that enactment, the assured is not entitled to add the value of the wreck to the cost of repairs. HALL *v.* HAYMAN - **Bray J. 5**

INTEREST—Income tax—Company—Foreign investments—Interest of, not remitted home—Objects of the company - **41**
See REVENUE. 3.

INTERPLEADER—Consent order for sale of goods -Calculation of time—Title of trustee in bankruptcy to proceeds of sale - - - - - - - **520**
See BANKRUPTCY. 1.

—— Judgment for a debt—Execution and sale of goods of judgment debtor—Claim by assignee of the debt to proceeds of sale - - - - - - - **459**
See COUNTY COURT. 3.

INVESTMENTS — Income tax — Company — Foreign investments—Interest of, not remitted home—Objects of the company - - - - - - - **41**
See REVENUE. 3.

JURISDICTION—County court.
See under COUNTY COURT.

—— Summary jurisdiction—Poor rate—Non-payment of—Issue of distress warrant
See JUSTICES. 1. **413**

JURY—Trial—Unconditional leave to defend—Right of defendant to trial by jury - **482**
See PRACTICE.

JUSTICES—*Poor Rate—Non-payment—Issue of Distress Warrant—Levy—Appeal to Quarter Sessions—"Order of a Court of summary jurisdiction"—Procedure on Appeal—Recognizance* —17 *Geo.* 2, *c.* 38, *s.* 7 — *Summary Jurisdiction Act*, 1879 (42 *&* 43 *Vict. c.* 49), *s.* 31, *sub-s.* 3—*Summary Jurisdiction Act*, 1884 (47 *&* 48 *Vict. c.* 43), *ss.* 6, 7.
An appeal to quarter sessions under s. 7 of 17 Geo. 2, c. 38, by a person aggrieved by a distress for non-payment of a poor rate is not an appeal from an "order" of a Court of summary jurisdiction within s. 31 of the Summary Jurisdiction Act, 1879, and the appeal is, therefore, not subject to the conditions and regulations prescribed by that section.
Reg. v. *London Justices* [1899] 1 Q. B. 532, applied. THE KING *v.* LINDSEY JUSTICES, LINCOLNSHIRE - - - - **Div. Ct. 413**

2. —— *Summary Conviction—Rehearing—Unsworn Evidence at First Hearing—Jurisdiction to rehear Case.*
The applicant was convicted by a metropolitan magistrate of assaulting a police constable in the execution of his duty, but by some inadvertence the constable who was assaulted gave his evidence at the hearing of the charge without being sworn. Upon the attention of the magistrate being called to the irregularity, he, later in the same day, reheard the case, all the evidence being then given upon oath. The magistrate again convicted the applicant. A rule having been obtained to quash the second conviction upon the ground (inter alia) that it was bad in that the applicant at the time of the conviction had previously been put in peril in respect of the same offence :—
Held, that the rule must be discharged inasmuch as the applicant had not been legally convicted on the first hearing and had therefore not been in peril at the time of the second hearing, and the second conviction was therefore good. REX *v.* MARSHAM. *Ex parte* PETHICK LAWRENCE - - - - - **Div. Ct. 362**

—— Adulteration.
See under ADULTERATION.

—— Club requiring registration—"Unregistered club" - - - - - - - **425**
See LICENSING ACTS. 1.

—— Company — Balance-sheet — Statement of values of "fixed assets"—Sufficiency of statement - - - - **354**
See COMPANY.

—— Criminal law — Prostitution of wife — Evidence of wife - - - - **89**
See CRIMINAL LAW. 1.

—— Extradition.
See under EXTRADITION.

—— Food and drugs, Sale of—Adulteration.
See under ADULTERATION.

—— Gaming.
See under GAMING.

—— Highway.
See under HIGHWAY.

—— Licensing Acts.
See under LICENSING ACTS.

—— London Building Acts, 1894 to 1909, Structure not in conformity with—Notice of irregularity - - - **209**
See LONDON. 2.

JUSTICES—*continued.*

—— London—Buildings — Dangerous structures - - - - - - - **504**
See LONDON. 1.

—— Lottery.
See under GAMING.

—— Motor car.
See under MOTOR CAR.

—— Poor law.
See under POOR LAW.

—— Rate—County rate—County of London—City of London - - - - **556**
See LONDON. 3.

—— Rate—County rate — Parish aggrieved—Cause of appeal—Time for giving notice of appeal—Overpayment, Recovery of
See RATES. 1. **603**

—— Rates.
See under RATES.

—— Sale of food and drugs—Adulteration.
See under ADULTERATION.

—— Waterworks.
See under WATER.

LANDLORD AND TENANT — *Distress—Purchase by Landlord of Goods distrained—Subsequent User of Goods by Landlord—Conversion—Distress for Rent Act*, 1737 (11 *Geo.* 2, *c.* 19), *s.* 19.

By s. 19 of the Distress for Rent Act, 1737, "where any distress shall be made for any kind of rent justly due, and any irregularity or unlawful act shall be afterwards done by the party or parties distraining, or by his, her, or their agents, the distress itself shall not be therefore deemed to be unlawful, nor the party or parties making it be deemed a trespasser or trespassers ab initio; but the party or parties aggrieved by such unlawful act or irregularity shall or may recover full satisfaction for the special damage he, she, or they shall have sustained thereby, and no more, in an action of trespass or on the case, at the election of the plaintiff or plaintiffs."

The defendants, who were the owners of a seam of coal, let it to a tenant with the right to work and get the coal on payment of a royalty for each ton of coal worked, and there was a power of distress if the royalties were unpaid. Subsequently the lessee sold to the plaintiffs the right to get coal under the lease held by him on payment to him of all such sums as should become due in respect of the royalties. After the plaintiffs had taken possession the royalties payable by the lessee to the defendants fell into arrear, and the defendants distrained certain ponies, the property of the plaintiffs, and certain wagons which the plaintiffs had hired from a wagon company. The defendants had the ponies and wagons appraised and purported to buy them for themselves at the appraised value, and they then worked the ponies for their own purposes, and delivered up the wagons to the wagon company on demand, though no sum was due for the hire of the wagons. In an action by the plaintiffs for conversion of the ponies and wagons, the sale to the defendants being invalid (*Moore, Nettlefold & Co.* v. *Singer Manufacturing Co.* [1904] 1 K. B. 830), the defendants contended that by reason of s. 19 of the Distress for Rent Act, 1737, they were not liable for conversion, but only for the special damage sustained by the plaintiffs:—

Held, that as the acts complained of were not done by the defendants in their capacity of distrainors nor in the course of the distress, but in their supposed capacity as owners of the goods by purchase and after the completion of the distress, s. 19 did not apply, and the defendants were liable for conversion. PLASYCOED COLLIERIES COMPANY *v.* PARTRIDGE, JONES & Co. - - - - - - - **Div. Ct. 345**

LESSOR AND LESSEE—Income tax—Lease of minerals—No entry by lessee—Payment of minimum rent under the lease—Assessment of lessor - - - **61**
See REVENUE. 5.

LICENSING ACTS — *Club — Club requiring Registration — "Unregistered Club" — Club struck off Register—Re-registration of same Club — Licensing (Consolidation) Act*, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *ss.* 92, 93, 95.

A club which has been struck off the register of clubs by an order of a Court of summary jurisdiction, under s. 95 of the Licensing (Consolidation) Act, 1910, cannot again be registered under the Act as a club. LEES *v.* LOVIE **Div. Ct. 425**

2. —— *Costs—Appeal against Refusal to renew Licence—Case stated by Quarter Sessions—Appeal allowed by High Court with Costs against Licensing Justices — Power to order Indemnity out of Local Funds—Licensing (Consolidation) Act*, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 32.

By s. 32 of the Licensing (Consolidation) Act, 1910, "Where an appeal under this Act is allowed, or where any such appeal is dismissed or abandoned and the licensing justices whose decision is appealed against cannot recover the costs incurred by them from any other person, the Court of quarter sessions shall order the treasurer of the county . . . . or, in the case of a licensing district being a borough having a separate Court of quarter sessions, the treasurer of the borough, to pay to the justices such sum as in the opinion of the Court is sufficient to indemnify them from all costs and charges whatsoever to which they may have been put."

Upon an appeal against the refusal of licensing justices to renew a licence the quarter sessions dismissed the appeal subject to a special case for the opinion of the High Court. The licensing justices, who were the respondents, did not appear upon the argument of the case, and the High Court allowed the appeal and ordered the respondent justices to pay to the appellant the costs of the appeal to that Court on the special case:—

Held, that these were costs to which the

LICENSING ACTS—*continued.*
licensing justices had been put within the meaning of s. 32 of the Licensing (Consolidation) Act, 1910), and that the licensing justices were therefore entitled to an order of quarter sessions upon the treasurer under that section to pay to them the amount thereof. THE KING *v.* SALFORD HUNDRED DIVISION OF THE COUNTY OF LANCASTER JUSTICES - - **Div. Ct. 567**

3. —— *Licence—Refusal to renew—Appeal—Death of Licensee—Right of Representatives to maintain Appeal—Persons aggrieved—Owners of Licensed Premises — Licensing (Consolidation) Act*, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 29.

Justices at a general annual licensing meeting refused to renew a licence to sell intoxicating liquors at a certain house on the grounds that the house had not been well conducted and that the fitness of the licence holder was unsatisfactory. The licence holder appealed to the quarter sessions. The owners of the house also appealed as being persons thinking themselves aggrieved by the refusal within the meaning of s. 29 of the Licensing (Consolidation) Act, 1910. Before the hearing of the appeal the licence holder died, and letters of administration were granted to his widow :—

Held, that the widow of the licence holder was entitled to maintain the appeal.

McDonald v. *Hughes* [1902] 1 K. B. 94, applied.

Held, also, that the owners of the house were "persons thinking themselves aggrieved by the refusal" within the meaning of s. 29 of the Licensing (Consolidation) Act, 1910. COOKE *v.* COOPER (BOLTON JUSTICES, LANCASHIRE) **Div. Ct. 248**

LONDON—*Buildings—Dangerous Structures—Power of London County Council to shore up—Ruinous and Neglected Structures—Liability of Owner—London Building Act*, 1894 (57 *&* 58 *Vict. c. ccxiii.*), *s.* 106 ; *s.* 107, *sub-s.* 1 ; *s.* 115, *sub-s.* 1.

The fact that the London County Council has in pursuance of the power given to it by s. 106 of the London Building Act, 1894, temporarily shored up a structure certified by the district surveyor to be in a dangerous state does not prevent the structure from still being in a dangerous state within the meaning of that section, s. 103, and s. 107, sub-s. 1, of the Act ; and the owner still remains liable, in proceedings taken against him under those sections in a petty sessional court, to an order to take down, repair, or otherwise secure to the satisfaction of the district surveyor the structure or such part thereof as appears to the Court to be in a dangerous state.

An order made by a petty sessional court under s. 115 of the Act of 1894, in respect of a ruinous and neglected structure, requiring the owner to carry out specified work upon the structure is no bar to subsequent proceedings in the petty sessional court under s. 107, sub-s. 1, of the Act against the owner of the structure for non-compliance with a notice to take down, secure, or repair the same served on him under s. 106 of the Act.

In order that a house may be dangerous within the meaning of s. 103, s. 106, and s. 107 sub-s. 1, of the Act it is not necessary that it should be dangerous to inmates or to the public passing along the adjacent highway. It is sufficient if there is an apprehension of danger or injury to adjoining houses or to their inhabitants, or even to trespassers. LONDON COUNTY COUNCIL *v.* JONES - - - - **Div. Ct. 504**

LONDON—*continued.*

2. —— *Buildings—Structure not in conformity with London Building Acts*, 1894 *to* 1909—*Notice of Irregularity—Non-compliance with Notice — Summons for Non-compliance—Structure vested in and in Occupation of Crown —Exemption—Subsequent Order by Magistrate to comply with Notice—Power to make Order—London Building Act*, 1894 (57 *&* 58 *Vict. c. ccxiii.*), *s.* 202.

By s. 202 of the London Building Act, 1894, it is provided that "There shall be exempted from so much of the provisions of this Act as relates to buildings and structures—

"Every building structure or work vested in and in the occupation of Her Majesty . . . ."

On April 5, 1911, a summons was taken out under s. 153 of the London Building Act, 1894, by the respondent, a district surveyor for the purposes of the London Building Acts, 1894 to 1909, against a firm of builders for non-compliance with a notice of irregularity which had been served upon them by the respondent on March 31, 1911, under s. 151 of the London Building Act, 1894, in respect of a building in course of erection by them. The building was admittedly not in accordance with the London Building Acts, 1894 to 1909. On July 20, 1911, a metropolitan magistrate made an order for compliance with the notice, the building having at that date become vested in and in the occupation of the Crown :—

Held, that the magistrate had no power to make the order. The order related to the building itself and was not merely an order that the builder should pay a fine for some previous offence, and inasmuch as the building was at the date of the order vested in and in the occupation of the Crown it was within the exemption contained in s. 202 of the Act. DELLAR BROTHERS, LIMITED AND TERRITORIAL FORCE ASSOCIATION OF THE COUNTY OF LONDON *v.* DRURY - **Div. Ct. 209**

3. —— *County Rate—County of London—City of London—Exemption of Property situate in City from Liability to County Rate—Rate based on Valuation List including exempted Property—Appeal—To what Quarter Sessions Appeal lies—County Rates Act*, 1852 (15 *&* 16 *Vict. c.* 81), *s.* 22—*Local Government Act*, 1888 (51 *&* 52 *Vict. c.* 41), *s.* 8 ; *s.* 40, *sub-s.* 3 ; *s.* 42, *sub-s.* 10.

A county rate having been made for the administrative county of London, the Common Council of the city of London, as overseers of the parish of the city of London, were desirous of appealing against the rate under s. 22 of the County Rates Act, 1852, upon the ground that the total in the valuation list upon which the rate was based included property in the City

LONDON—*continued.*
which was exempted by statute from liability to county rate :—

Held, that the appeal lay to the quarter sessions of the county of London, and not to the quarter sessions of the city of London. THE KING *v.* COUNTY OF LONDON JUSTICES. THE KING *v.* CITY OF LONDON JUSTICES
Div. Ct. 556

4. —— *Port of London — Registration of Craft — Sailing Barge — "All lighters, barges, and other like craft"—Port of London Act*, 1908 (8 *Edw.* 7, *c.* 68), *s.* 11, *sub-s.* 2 (*f*) (i.).

A sailing barge is a "lighter, barge, or other like craft" within the meaning of s. 11, sub-s. 2 (*f*) (i.), of the Port of London Act, 1908, and is accordingly prohibited from navigating either wholly or partly within the limits of that Act unless she has been registered by the Port of London Authority. SMEED, DEAN & CO. *v.* PORT OF LONDON AUTHORITY
Hamilton J. 585

LOTTERY—Purchase of chance—Gift of prize—Money paid by purchaser of chance not used for purchase of prize - - **497**
See GAMING.

MAGISTRATES.
See under JUSTICES.

MARINE INSURANCE.
See under INSURANCE (MARINE).

MASTER AND SERVANT — Employer and workman.
See under EMPLOYER AND WORKMAN.

—— Surety for fidelity of servant — Action against surety - - - - **72**
See PRINCIPAL AND SURETY.

METROPOLIS.
See under LONDON.

MILK — Sale of food and drugs — Written warranty - - - - - **388**
See ADULTERATION. 2.

MINERALS.
See under MINES.

MINES—Income tax—Lease of minerals—No entry by lessee—Payment of minimum rent under the lease—Assessment of lessor - - - - - - **61**
See REVENUE. 5.

—— Mineral rights duty—Rental value—Landlord's property tax—Super-tax - **281**
See REVENUE. 6.

MISTAKE — County court—Hearing before registrar—Mistake of law—Power of county court judge to order a new trial
See COUNTY COURT. 2. **528**

—— Workmen's compensation—Notice of accident - - - - - - **308**
See EMPLOYER AND WORKMAN. 13.

MONEY HAD AND RECEIVED—Liability of infant - - - - - - **419**
See CONTRACT.

MONEY-LENDER — *Registered Name — Misdescription in Promissory Note—Business carried on in other than Registered Name—Money-lenders Act*, 1900 (63 & 64 *Vict. c.* 51), *s.* 2, *sub-s.* 1 (*b*).

A money-lender registered in the name of the Wentworth Loan and Discount Office was described in a promissory note, given to her by a borrower as security for a loan, as the Wentworth Loan and Discount Company :—

Held that the money-lender was not, by reason of the substitution of the word "company" for "office" in the promissory note, carrying on the business of money-lending in a name other than her registered name.

Decision of Divisional Court affirmed.
PEIZER *v.* LEFKOWITZ - - **C. A. 235**

MOTOR CAR—*User at Night without Lamp kept burning so as to illuminate Identification Plate —Offence under Motor Car Act*, 1903—*Motor Car (Registration and Licensing) Order*, 1903, *art. XI.—Defence open to defendant—Motor Car Act*, 1903 (3 *Edw.* 7, *c.* 36), *s.* 2, *sub-s.* 4.

The appellant was charged under art. XI. of the Motor Car (Registration and Licensing) Order, 1903, with using a motor cycle at night on a public highway without having a lamp burning on the cycle so contrived as to illuminate every letter or figure on the cycle as required by the article :—

Held, that the offence with which the appellant was charged was an offence under s. 2, sub-s. 4, of the Motor Car Act, 1903, and that it was open to him under the sub-section to set up the defence that he had taken all steps reasonably practicable to prevent the letters and figures which ought to have been illuminated being obscured or rendered not easily distinguishable.

Brown v. *Crossley* [1911] 1 K. B. 603, followed. PRINTZ *v.* SEWELL - **Div. Ct. 511**

MOTOR CAR (REGISTRATION AND LICENSING) ORDER, 1903, Art. XI. - **511**
See MOTOR CAR.

NEGLIGENCE — Workmen's compensation — Negligence of persons other than employer—Indemnity - - - **323**
See EMPLOYER AND WORKMAN. 12.

NEW TRIAL.
See TRIAL.

NOTICE—Bankruptcy notice.
See under BANKRUPTCY.

—— Purchaser for value without notice—Voluntary settlement—Bankruptcy of settlor —Sale by voluntary donee after act of bankruptcy—Title of trustee - **257**
See BANKRUPTCY. 8.

—— Workmen's compensation — Accident — "Mistake or other reasonable cause" **308**
See EMPLOYER AND WORKMAN. 13.

ORIGINATING SUMMONS—Umpire—Appointment by Court—Arbitrator made respondent to summons - - - **542**
See ARBITRATION.

PARTNERSHIP—Executors carrying on testator's business in his firm name — Receiving order against firm—Whether executors are partners - - - **491**
See BANKRUPTCY. 7.

PAUPER—Poor law.
See under POOR LAW.

POLICY—Ship—Constructive total loss—Cost of repair—Value of wreck - - **5**
See INSURANCE (MARINE). 2.

POOR LAW — *Pauper — Settlement — Deserted Wife—Acquisition of Settlement by Residence—Poor Removal Act*, 1861 (24 & 25 *Vict. c.* 55), *s.* 3—*Divided Parishes and Poor Law Amendment Act*, 1876 (39 & 40 *Vict. c.* 61), *ss.* 34, 35.

A deserted wife can, under s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876, acquire a settlement by residence in a parish for three years in such manner and in such circumstances in each of those years as would render her irremovable therefrom. ST. MATTHEW'S, BETHNAL GREEN, GUARDIANS *v.* PADDINGTON GUARDIANS - - **Div. Ct. 335**

POOR RATE.
See under RATES.

PORT OF LONDON.
See LONDON.

PRACTICE—*Trial—Unconditional Leave to Defend—Right of Defendant to Trial by Jury—Order XIV.—Order XXXVI., r.* 6.

Upon an application under Order XIV. for leave to sign final judgment a Master gave unconditional leave to defend and ordered the trial to be before a judge in Middlesex. This order was affirmed on appeal by a judge in chambers, but was not further appealed against. The defendant subsequently applied under Order XXXVI., r. 6, for a trial with a jury:—

Held, that the fact that the order directing a trial by a judge had not been appealed against was fatal to the application for trial by a jury.

Wolfe v. *De Braam* (1899) 81 L. T. 533, and *Macartney* v. *Macartney* (1909) 25 Times L. R. 818, considered. KELSEY *v.* DOUNE **C. A. 482**

—— New trial—Power of county court judge to order—Hearing before magistrate—Mistake of law - - - - **528**
See COUNTY COURT. 2.

PREFERENTIAL PAYMENT—Workmen's compensation — Limited company—Winding-up - - - - - - **303**
See EMPLOYER AND WORKMAN. 7.

PRINCIPAL AND SURETY—*Surety for Fidelity of Servant—Action against Surety—Avoidance of Contract of Suretyship—Non-disclosure to Surety of previous Dishonesty of Servant—Implied Representation as to Honesty of Servant—Undue Concealment of Fact—Fraud not necessary to Defence grounded on such Concealment.*

Where the employer of a servant, when taking a bond from another, which purported to make him responsible as surety for the fidelity of the servant, did not disclose to the surety the fact, known to the employer, but not known to the surety, that the servant had previously been guilty of dishonesty in his employment, the employer cannot enforce the bond against the surety in respect of subsequent dishonesty of the servant, although the non-disclosure by the employer of the previous dishonesty of the servant was not fraudulent:—

So *held* by the Court of Appeal, affirming the judgment of Lord Alverstone C.J.

Distinction between suretyship for the fidelity of a servant and a guarantee in respect of a banking account discussed. LONDON GENERAL OMNIBUS COMPANY, LIMITED *v.* HOLLOWAY **C. A. 72**

PROMISSORY NOTE — Misdescription in — Money-lender—Registered name - **235**
See MONEY-LENDER.

PROSTITUTION — Vagrancy — Evidence — Admissibility—Living on earnings of prostitution—Evidence of wife - **89**
See CRIMINAL LAW. 1.

PUBLIC HEALTH—Rates—Assessment—Tramway—"Land used only as a railway"
See RATES. 2. **216**

PURCHASER—Vendor and.
See under VENDOR AND PURCHASER.

QUARTER SESSIONS—Appeal—County rate—County of London—City of London—Exemption of property — To what quarter sessions appeal lies - - **556**
See LONDON. 3.

—— Licensing Acts—Costs — Appeal — Case stated by quarter sessions - - **567**
See LICENSING ACTS. 2.

RAILWAY—*Fire caused by Sparks from Engine—Damage to Agricultural Crops—"Particulars of damage" within Fourteen Days—Amount of Claim in Money—Railway Fires Act*, 1905 (5 *Edw.* 7, *c.* 11), *ss.* 1, 3.

By s. 1, sub-s. 1, of the Railway Fires Act, 1905, when damage is caused to agricultural land or to agricultural crops by fire arising from sparks or cinders emitted from any locomotive engine used on a railway, the fact that the engine was used under statutory powers shall not affect liability in an action for such damage; and by sub-s. 3, the section shall not apply in the case of any action for damage unless the claim for damage in the action does not exceed 100*l.* By s. 3, "This Act shall not apply in the case of any action for damage by fire brought against any railway company unless notice of claim and particulars of damage, in writing, shall have been sent to the said railway company within seven days of the occurrence of the

RAILWAY —*continued.*

damage as regards the notice of claim, and within fourteen days as regards the particulars of damage" :—

Held, that the "particulars of damage" required by s. 3 to be sent to the railway company must contain a statement of the amount of the claim in money. MARTIN *v.* GREAT EASTERN RAILWAY COMPANY - **Channell J. 406**

2. —— *Railway and Canal Commission — Practice—Application for Through Rate over one Railway—Intervention of competing Railways—Railway and Canal Traffic Act*, 1888 (51 *&* 52 *Vict. c.* 25), *s.* 7.

Sect. 7 of the Railway and Canal Traffic Act, 1888, which authorizes certain local authorities and associations of traders and others to appear in opposition to any complaint which the Commissioners have jurisdiction to determine, is not exhaustive of the classes of persons whose intervention in such a complaint the Commissioners have jurisdiction to allow.

An agreement was entered into between the several railway companies which conveyed traffic to and from the various docks in the Port of London whereby they grouped the said docks together and charged the same rate from given points on their systems for similar traffic to every dock. Subsequently the Port of London Authority, in whom the said docks were then vested, made application to the Railway and Canal Commission for a new and reduced through rate from two of the said docks to various stations on the systems of certain of the contracting railway companies. Certain of the other contracting railway companies claimed to intervene :—

Held, that there was jurisdiction to allow the intervention. PORT OF LONDON AUTHORITY *v.* MIDLAND RAILWAY COMPANY

Railway and Canal Commission 1

RATES — *Appeal — County Rate — Parish aggrieved—Cause of Appeal—Time for giving Notice of Appeal — Overpayment by Parish—Recovery of Overpayment—County Rates Act*, 1852 (15 *&* 16 *Vict. c.* 81), *ss.* 22, 23.

By s. 22 of the County Rates Act, 1852, if the overseers of the poor shall have reason to think that a parish is aggrieved by any rate made upon the basis or standard for the county rate, they may appeal to the next quarter sessions after "such cause of appeal" shall have arisen.

By s. 23 of the Act, if it appears to the Court of quarter sessions that any parish has previously to the determination of the appeal paid any sums of money in consequence of such rates which ought not to have been paid, the Court shall order the proportion so paid subsequently to the notice of appeal to be repaid to the parish.

On March 17, 1910, a county council fixed the county rate assessment basis for a parish, and on the same day made a rate on the basis so fixed. The county council forwarded their warrant for the first instalment to the guardians of the union in which the parish was included, making the instalment payable by two equal payments. The guardians of the union in due course issued their precept to the overseers of the poor for the amount of the warrant, making it payable in two equal portions, one portion being made payable on August 20, 1910.

The county council subsequently forwarded their warrant for the second instalment to the guardians of the parish, making it payable by two equal payments, and the guardians duly issued their precept to the overseers for the amount of the warrant, making it payable in two equal portions, one portion being made payable on February 18, 1911. The parish overseers made the payments in August, 1910, and February, 1911, as required by the precepts.

On September 2, 1910, a railway company gave notice to the assessment committee of the union in which the parish was included of objection to their assessment in respect of a portion of their line within the parish on the ground of over assessment, and similar notices were during 1910 given by other ratepayers within the parish. For the purposes of the present case the poor rate valuation was taken to be the same as the county rate assessment basis.

On September 27, 1910, the parish overseers gave notice to the county council that they felt aggrieved by and objected to the county rate of March 17, 1910, and that they intended to appeal against the rate at the next quarter sessions for the county.

On April 13, 1911, the union assessment committee reduced the assessment of the railway company, and from time to time the assessment of the other objectors. The parish overseers subsequently repaid to the railway company and other objectors 121*l.* 6*s.* in respect of over assessment to the county rate as regarded the instalment payable on August 20, 1910, and 107*l.* 5*s.* as regarded the instalment payable on February 18, 1911.

The hearing of the appeal of the parish overseers to quarter sessions was by consent respited from time to time and ultimately took place on June 27, 1911, when the Court of quarter sessions ordered the county council to refund to the parish overseers the two sums of 121*l.* 6*s.* and 107*l.* 5*s.* as being the amounts overpaid by them in August, 1910, and February, 1911, respectively :—

Held, that it was not competent for the Court of quarter sessions to hear the appeal or to order repayment by the county council to the parish overseers of either of the two sums inasmuch as, assuming that the parish overseers were aggrieved, the grievance arose either on March 17, 1910, when the county rate was made, in which case the notice of appeal of September 27, 1910, was too late, or on April 13, 1911, when the reduction in the assessment of the railway company and the other objectors was made by the union assessment committee, in which case the notice of appeal was premature.

Held, further, that, even if the notice of appeal had been given at the proper time, the Court of quarter sessions would have had no power to order repayment to the overseers of the sum of 121*l.* 6*s.* inasmuch as the payment of that sum was made by them in August, 1910, before their notice of appeal to quarter sessions

RATES—*continued.*
of September 27, 1910, was given, and under ss. 22 and 23 of the Act of 1852 power is only conferred on a Court of quarter sessions to which the overseers appeal against a county rate to order repayment to the overseers of any sums overpaid by them after their notice of appeal against the county rate is given by them. GLAMORGAN COUNTY COUNCIL *v.* BARRY OVERSEERS - - - - - - **Div. Ct. 603**

2. ——*Tramway*—"*Land used only as a railway*"—*General District Rate—Assessment—Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 211, *sub-s.* 1 (*b*).

A company were the owners and occupiers of, and worked as one connected system, a tramway and a light railway, which were constructed in and along certain public streets and roads in the district of an urban council. The tramway and the light railway were constructed and worked under and subject to the provisions of certain local Acts and Orders; they had a junction with each other and were worked by electricity on the overhead system. They were identical as to mode of construction and materials used, and the rails of each were laid with their uppermost surface level with the surface of the highway; the same carriages were used upon them and ran through from the one on to the other, and the electrical energy used for working both the tramway and the light railway was generated at the same power station and thence transmitted over a common system of cables and mains to sub-stations:—

Held, that the tramway was "land used only as a railway constructed under the powers of an Act of Parliament" within the meaning of s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875, and that the company were therefore entitled in respect of their tramway to be assessed to the general district rate at one fourth only of its net annual value.

Swansea Improvements and Tramway Co. v. *Swansea Urban Sanitary Authority* [1892] 1 Q. B. 357, overruled. METROPOLITAN ELECTRIC TRAMWAYS, LIMITED *v.* TOTTENHAM URBAN DISTRICT COUNCIL - - - - **C. A. 216**

—— County rate—County of London—City of London—Exemption of property - **556**
See LONDON. 3.

—— Poor rate—Non-payment—Issue of distress warrant — Levy — Appeal to quarter sessions - - - - - - **413**
See JUSTICES. 1.

—— Railway.
See under RAILWAY.

RECEIVING ORDER—Bankruptcy — Dismissal of petition—Receiving order made on appeal—Relation back of order - **367**
See BANKRUPTCY. 6.

RE-CERTIFICATION — Workmen's compensation - - - - - - - - **26**
See EMPLOYER AND WORKMAN. 8.

REGISTRAR—Hearing before—Mistake of law—Power of county court judge to order a new trial - - - - - **528**
See COUNTY COURT. 2.

REGISTRATION—Money-lenders.
See under MONEY-LENDER.

—— Port of London—Registration of craft—Sailing barge - - - - - **585**
See LONDON. 4.

REHEARING—Summary conviction—Unsworn evidence at first hearing—Jurisdiction to rehear case - - - - - **362**
See JUSTICES. 2.

RENT—Distress for—Purchase by landlord of goods distrained—Subsequent user of goods by landlord—Conversion - **345**
See LANDLORD AND TENANT.

REVENUE — *Estate Duty — Settlement Estate Duty—Advowson—Proceeds of Sale—Succession Duty Act*, 1853 (16 *&* 17 *Vict. c.* 51), *s.* 24—*Finance Act*, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 15, *sub-s.* 4.

Neither estate duty nor settlement estate duty is, under the Finance Act, 1894, payable upon the principal value of an advowson or upon the proceeds of the sale thereof. ATTORNEY-GENERAL *v.* PEEK - - **Hamilton J. 192**

2. —— *Income Tax — Club — Fees received from Visitors—Profit or Gain—Method of Assessment—Income Tax Act*, 1842 (5 *&* 6 *Vict. c.* 35), *Sched. D, First and Sixth Cases.*

A club, an ordinary bona fide members' golf club, acquired land under a lease granted by a railway company. In addition to the members of the club, who were entitled on payment of their subscription to play on the links and to other privileges for the current twelve months, each full member might introduce a friend three times a year free of charge. A considerable number of visitors used the club-house and played on the links in accordance with a provision contained in the lease which provided that they should be allowed to play on payment of the green fees of 1*s.* 6*d.* per day, 5*s.* per week, or 10*s.* per month, as the case might be, or such other charges as the lessors might from time to time fix not less than the minimum amounts of 1*s.* 3*d.* per day, 4*s.* per week, or 10*s.* per month. The total annual expenditure incurred in maintaining the links in a condition fit to play golf upon exceeded the total amount of fees received from visitors.

The Commissioners for the General Purposes of the Income Tax Acts decided that the club was liable to assessment in respect of visitors' green fees less such proportion of the annual outlay in maintaining and keeping up the links and club-house as the visitors' contributions bore to the entire annual income of the club or fund available for the maintenance and upkeep:—

Held, that the club was carrying on an enterprise which was beyond the scope of the ordinary functions of the club, and as to which it was possible to keep separate accounts so as to ascertain whether there were any profits, and that any profits derived from the visitors' green

REVENUE—*continued.*

fees were therefore taxable under Sched. D of the Income Tax Act, 1842.

Held, further, that the method of arriving at the amount of the taxable profits adopted by the Commissioners was erroneous, and that in default of agreement the case must go back to them to ascertain the amount of taxable income received by the club. CARLISLE AND SILLOTH GOLF CLUB *v.* SMITH - - - **Hamilton J. 177**

3. —— *Income Tax — Company — Foreign Investments—Interest of, not remitted home—Objects of the Company — Adventure—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Sched. D, First, Fourth, and Fifth Cases—Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Sched. D.*

A fire and life insurance company which carried on business both at home and abroad was registered in this country and had its head office and board of direction here. One of the objects mentioned in its memorandum of association was to invest money not immediately required in such manner as might from time to time be determined. By the laws of certain of the foreign States in which it so carried on business an insurance company was required, as a condition of permission to carry on business there, to deposit with the Governments of those countries certain sums of money and to invest those sums in accordance with the local laws. In pursuance of those requirements the company invested certain sums in those States. It also voluntarily invested there other sums representing accumulated profits of its business. Both classes of investments yielded interest which was received by the company abroad, but was not remitted to the United Kingdom :—

Held, that the Crown had an option to tax the income of the foreign investments either under case 1 or case 4 of Sched. D of s. 100 of the Income Tax Act, 1842, but not under both ; that the power to invest conferred by the memorandum was not a distinct object of the company ; that the business of the company in all its branches was in truth one ; and that the whole business came within the word "adventure" in case 1.

Decision of Hamilton J. [1911] 2 K. B. 577, affirmed. LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY *v.* BENNETT. BRICE *v.* NORTHERN ASSURANCE COMPANY. BRICE *v.* OCEAN ACCIDENT AND GUARANTEE CORPORATION - - - - - - - - **C. A. 41**

4. —— *Income Tax—Lands, Tenements, or Hereditaments—Waterworks—Annual Value—Profits — Rural District Council — Supply of Water to Contributory Places—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 60, *Sched. (A.), No. III.* ; *s.* 100, *Sched. (D.)* ; *s.* 101—*Revenue Act*, 1866 (29 & 30 *Vict. c.* 36).

A rural district council under the powers conferred by the Public Health Act, 1875, supplied water to a number of contributory places. To some of these places the water was supplied at a profit, and to others at a loss, to the council. In assessing the council under No. III. of Sched. (A.) to s. 60 of the Income Tax Act, 1842, in respect of the annual value or

REVENUE—*continued.*

profits of waterworks, the surveyor of taxes took into account only those dealings which shewed a profit, on the ground that the undertaking of supplying water was in respect of each contributory place a separate undertaking or concern :—

Held, that the undertaking of supplying water was not in respect of each contributory place a separate concern, but that the waterworks as a whole constituted one concern, and that the council was to be charged upon the balance of profits over losses.

By s. 8 of the Revenue Act, 1866, the concerns described in No. III. of Sched. (A.) of the Income Tax Act, 1842, are to be charged and assessed in the manner in the said No. III. mentioned according to the rules prescribed by Sched. (D.) of the same Act of 1842 so far as such rules are not inconsistent with No. III. of Sched. (A.) :—

Held, that this enactment does not constitute persons engaged in the concerns described in No. III. of Sched. (A.) "persons carrying on concerns in the nature of trade the profits whereof are made chargeable under the rules of Sched. (D.)" within the meaning of s. 101 of the Act of 1842 so as to entitle them under that section to set against the profits acquired in one or more of those concerns the excess of the loss sustained in any of the other concerns over and above the profits thereof. WAKEFIELD RURAL DISTRICT COUNCIL *v.* HALL **Hamilton J. 265**

5. —— *Income Tax—Lease of Minerals—No Entry by Lessee—Payment of Minimum Rent under the Lease—Assessment of Lessor—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 60, *Sched. A, No. II., r.* 6.

The appellant granted to a company a lease for a term of years of all the coal and other minerals under land of which he was the owner at a "footage rent or royalty" to be computed yearly and at a "minimum yearly rent" of 60*l.* The company also owned the minerals under adjoining lands, which it intended to work together with the demised minerals as one colliery undertaking. The company had bored for coal under the adjoining lands, but no borings or workings had taken place with regard to the demised coal ; and the company had not yet produced any coal or minerals.

The company paid the minimum yearly rent of 60*l.* to the lessor, deducting the income tax ; but it did not pay over the amount of the tax to the Crown. No assessment had been made in respect of the demised coal. The lessor, having been assessed to income tax under Sched. A in respect of the sum of 60*l.*, appealed against the assessment :—

Held, that the company was not in occupation of the demised coal and was not entitled to deduct the tax from the payment made to the lessor ; and that the lessor was properly assessed in respect of the minimum yearly rent paid to him as "profits arising from lands tenements and hereditaments not in the actual possession or occupation of the party to be charged," within s. 60, Sched. A, No. II., r. 6, of the Income Tax Act, 1842. HILL *v.* GREGORY **Hamilton J. 61**

REVENUE—*continued.*

6. *Mineral Rights Duty—Rental Value — Rent paid by Working Lessee in last Working Year—Arrears of Rent—Landlord's Property Tax—Super-tax—Finance* (1909–10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *ss.* 20, 66.

By s. 20 of the Finance (1909–10) Act, 1910, mineral rights duty is charged on the rental value of all rights to work minerals. Where the right to work the minerals is the subject of a mining lease, the rental value is the amount of rent paid by the working lessee in the last working year in respect of that right.

The appellant was the grantor of a mining lease at a yearly rent of 500*l.* In the year ending September 30, 1909 (which was the last working year for the purposes of the case), he received from the lessees a sum of 356*l.* 5*s.*, being 375*l.* in respect of three quarters' rent in arrear for the year 1907 less 18*l.* 15*s.* deducted by the lessees in respect of income tax :—

Held, that the amount of rent paid by the working lessees included the sum of 356*l.* 5*s.*, but did not include the sum of 375*l.*, and consequently that the former and not the latter sum constituted the rental value upon which mineral rights duty was chargeable.

By s. 66 of the Act there is charged for the year therein specified in respect of the income of any individual the total of which from all sources exceeds 5000*l.* an additional duty of income tax referred to in the Act as super-tax. For the purposes of super-tax the total income of any individual from all sources is the total income of that individual from all sources for the previous year estimated in the same manner as the total income from all sources is estimated for the purposes of exemptions or abatements under the Income Tax Acts.

It being assumed that the appellant was liable to pay super-tax :—

Held, that in order to arrive at the rental value of the mineral rights aforesaid the amount of super-tax was not to be deducted from the above sum of 356*l.* 5*s.* DUKE OF BEAUFORT *v.* INLAND REVENUE COMMISSIONERS **Hamilton J. 281**

RULES OF THE SUPREME COURT :—

—— **Order XIV.**—*Leave to sign judgment and defend where writ specially indorsed* *See* PRACTICE. **482**

—— **Order XXXVI., r. 6.**—*Trial* - - **482**
See PRACTICE.

—— **Order LVII., rr. 1, 8, 11, 12.**—*Interpleader* *See* BANKRUPTCY. 1. **520**

SAILING BARGE — Port of London — Registration of craft - - - - - **585**
See LONDON. 4.

SAILOR—Ship — Intoxicated sailor — Absence from ship without leave—Return to duty - - - - - - - **155**
See EMPLOYER AND WORKMAN. 15.

SALE—Food and drugs—Adulteration.
See under ADULTERATION.

SALE OF GOODS—*Price to include Cost, Freight, and Insurance—Cash in Exchange for Shipping Documents — Shipment within certain Dates—Shipment by Steamer or Steamers direct or indirect to Port of Destination—Transhipment—Tender of Bill of Lading from Port of Transhipment.*

Sellers agreed to sell 400 bales of hemp at a price to include cost, freight, and insurance. By the terms of the contract of sale the hemp was to be shipped from a port in the Philippine Islands or from Hong Kong by steamer or steamers direct or indirect to London between October 1 and December 31, 1909 ; payment was to be by cash in exchange for shipping documents, and disputes under the contract were to be settled by arbitration.

The sellers then purchased from B. & Co. 400 bales of hemp. This hemp had been shipped at Manila, a port in the Philippine Islands, under bills of lading dated at that place December 28, 1909, for delivery at Hong Kong to the order of the shippers ; it was intended for transhipment and was transhipped on a steamer bound for London, the bills of lading being dated at Hong Kong March 25, 1910 ; it had been insured by the shippers from Manila to London.

The sellers tendered to the buyers in fulfilment of the contract of sale the bills of lading from Hong Kong and the policy of insurance from Manila to London. The buyers paid the contract price under protest, contending that these documents were not a good tender under the contract. The dispute was referred to arbitration.

The arbitrator found that it was a usual course, when goods were shipped from Manila to London, to tranship them at Hong Kong, but to ship them in the first instance at Manila on a through bill of lading from Manila to London ; in so far as it was a question of fact, he found that, on a contract of sale of goods on cost, freight, and insurance terms, it was by mercantile usage, unless otherwise agreed, the duty of the seller to provide by contract of affreightment for the carriage of goods from the port of shipment to the port of destination named in the contract, and by an indorsed bill of lading, or otherwise, to transfer to the buyer the benefit of the rights created by the contract of affreightment between the shipper and the shipowner for the entire voyage from the port of shipment to the port of destination :—

Held, that the tender of the documents was not a good tender under the contract, first, because it did not include a contract of affreightment to London made before December 31, 1909, and, secondly, because it did not include a contract of affreightment from Manila to Hong Kong. LANDAUER & Co. *v.* CRAVEN & SPEEDING BROTHERS - - **Scrutton J. 94**

See also a report of COX, MCEUEN & Co. *v.* MALCOLM & Co., as a note at pp. 107—111 of the above case.

—— Goods, Sale of—Set-off—Debt due from owner to purchaser—Action for price of goods sold - - - - - **329**
See AUCTIONEER.

SALE OF GOODS—*continued.*

—— Vendor and purchaser.
See under VENDOR AND PURCHASER.

SCHOOLS — *Furniture — Education — Public Elementary School—New Non-provided School—Power and Duty of Local Education Authority to provide Furniture — Education Act*, 1902 (2 *Edw.* 7, *c.* 42), *ss.* 7, 8.

Where persons other than the local education authority provide a new school under the provisions of s. 8 of the Education Act, 1902, the local authority have power to provide and pay for the furniture required to equip it as a public elementary school by reason of the obligation imposed upon them, by s. 7, sub-s. 1, to "maintain and keep efficient all public elementary schools within their area which are necessary."

Two new non-provided schools were opened as public elementary schools and each school was subsequently placed by the Board of Education upon the annual grant list as from the respective dates of opening. All the furniture for one school was supplied and paid for by the local education authority before it was opened; the other school, when opened, was provided with furniture belonging to the managers, which was unsuitable and shortly afterwards removed by the local authority and replaced by new furniture at their expense :—

Held (Darling J. dissenting as to the unfurnished school), that the local education authority had power to provide and pay for the new furniture of each school under s. 7, sub-s. 1, of the Education Act, 1902. REX *v.* EASTON. *Ex parte* OULTON - - - **Div. Ct. 161**

SERVANT.
See under MASTER AND SERVANT.

SET-OFF—Debt due from owner to purchaser—Action for price of goods sold - **329**
See AUCTIONEER.

SETTLEMENT—Bankruptcy of settlor—Voluntary settlement — Sale by voluntary donee after act of bankruptcy—Title of trustee - - - - - - **257**
See BANKRUPTCY. 8.

—— Poor law.
See under POOR LAW.

—— Settlement estate duty.
See under REVENUE.

SHERIFF—Act of bankruptcy — Interpleader summons — Consent order for sale of goods—Calculation of time - - **520**
See BANKRUPTCY. 1.

SHIPPING—Insurance (Marine).
See under INSURANCE (MARINE).

—— Port of London—Registration of craft—Sailing barge - - - - - **585**
See LONDON. 4.

—— Sale of goods.
See under SALE OF GOODS.

—— Workmen's compensation—Death on high seas—British ship—Territorial limits of United Kingdom—Jurisdiction - **299**
See EMPLOYER AND WORKMAN. 14.

SHIPPING—*continued.*

—— Workmen's compensation — Intoxicated sailor — Absence from ship without leave—Return to duty - - - **155**
See EMPLOYER AND WORKMAN. 15.

STATUTES:—

1737.

11 Geo. 2, c. 19, s. 19—*Distress for Rent* **345**
See LANDLORD AND TENANT.

1743.

17 Geo. 2, c. 38, s. 7—*Poor Relief* - **413**
See JUSTICES. 1.

1802.

42 Geo. 3, c. 119, s. 2—*Gaming* - - **497**
See GAMING.

1823.

4 Geo. 4, c. 60, s. 41—*Lotteries* - - **497**
See GAMING.

1835.

5 & 6 Will. 4, c. 50, s. 23—*Highway* - **432**
See HIGHWAY.

1842.

5 & 6 Vict. c. 35, s. 60, Sched. A, No. II., r. 6—*Income Tax* - - - - - **61**
See REVENUE. 5.

—— —— Sched. (A.), No. III.; s. 100, Sched. (D.); s. 101 - - - **265**
See REVENUE. 4.

—— —— Sched. D, first and sixth cases **177**
See REVENUE. 2.

—— —— s. 100, Sched. D, first, fourth, and fifth cases - - - - - - **41**
See REVENUE. 3.

1847.

10 & 11 Vict. c. 17, ss. 28, 85—*Waterworks Clauses* - - - - - - **16**
See WATER.

1852.

15 & 16 Vict. c. 81, s. 22—*County Rates* - **556**
See LONDON. 3.

—— —— ss. 22, 23 - - - - - **603**
See RATES. 1.

1853.

16 & 17 Vict. c. 34, s. 2, Sched. D—*Income Tax* - - - - - - - **41**
See REVENUE. 3.

16 & 17 Vict. c. 51, s. 24—*Succession Duty* **192**
See REVENUE. 1.

1861.

24 & 25 Vict. c. 55, s. 3—*Poor Removal* - **335**
See POOR LAW.

1866.

29 & 30 Vict. c. 36—*Revenue* - - - **265**
See REVENUE. 4.

STATUTES—*continued.*

1875.

38 & 39 Vict. c. 55, s. 211, sub-s. 1 (*b*)—*Public Health* - - - - - - **216**
See RATES. 2.

38 & 39 Vict. c. 63, s. 6—*Sale of Food and Drugs* - - - - - - - **471**
See ADULTERATION. 1.

—— —— s. 14 - - - - - - **243**
See ADULTERATION. 3.

1876.

39 & 40 Vict. c. 61, ss. 34, 35—*Divided Parishes and Poor Law Amendment* - - **335**
See POOR LAW.

1879.

42 & 43 Vict. c. 49, s. 31, sub-s. 3—*Summary Jurisdiction* - - - - - - **413**
See JUSTICES. 1.

1883.

46 & 47 Vict. c. 52, s. 4, sub-s. 1 (*g*)—*Bankruptcy* - - - - **451**
See BANKRUPTCY. 3.

—— —— s. 4, sub-s. 1 (*g*); s. 43 - - **533**
See BANKRUPTCY. 2.

—— —— ss. 17, 69 - - - - **251**
See BANKRUPTCY. 4.

—— —— ss. 20, 115 - - - - **491**
See BANKRUPTCY. 7.

—— —— s. 47 - - - - - **257**
See BANKRUPTCY. 8.

—— —— s. 49 - - - - - **367**
See BANKRUPTCY. 6.

1884.

47 & 48 Vict. c. 43, ss. 6, 7—*Summary Jurisdiction* - - - - - - **413**
See JUSTICES. 1.

1888.

51 & 52 Vict. c. 25, s. 7—*Railway and Canal Traffic* - - - - - - - **1**
See RAILWAY. 2.

51 & 52 Vict. c. 41, s. 8; s. 40, sub-s. 3; s. 42, sub-s. 10—*Local Government* - **556**
See LONDON. 3.

51 & 52 Vict. c. 43, ss. 56, 69, 114, 124, 126—*County Courts* - - - - - **398**
See COUNTY COURT. 4.

—— —— ss. 92, 93 - - - - **528**
See COUNTY COURT. 2.

—— —— ss. 156, 157 - - - - **459**
See COUNTY COURT. 3.

1889.

52 & 53 Vict. c. 49, s. 5—*Arbitration* - **542**
See ARBITRATION.

1890.

53 & 54 Vict. c. 39, s. 1—*Partnership* - **491**
See BANKRUPTCY. 7.

STATUTES—*continued.*

53 & 54 Vict. c. 71, s. 1—*Bankruptcy* - **520**
See BANKRUPTCY. 1.

—— —— ss. 8, 27 - - - - - - **251**
See BANKRUPTCY. 4.

1894.

57 & 58 Vict. c. 30, s. 15, sub-s. 4—*Finance*
See REVENUE. 1. **192**

57 & 58 Vict. c. ccxiii., s. 106; s. 107, sub-s. 1; s. 115, sub-s. 1—*London Building* - - - - - - **504**
See LONDON. 1.

—— —— s. 202 - - - - - - **209**
See LONDON. 2.

1897.

60 & 61 Vict. c. 37, Sched. I., par. 12; Sched. II., par. 1—*Workmen's Compensation* - - - - - - **444**
See EMPLOYER AND WORKMAN. 6.

1898.

61 & 62 Vict. c. 36, s. 1—*Criminal Evidence*
See CRIMINAL LAW. 2. **464**

61 & 62 Vict. c. 39, s. 1—*Vagrancy* - **89**
See CRIMINAL LAW. 1.

1899.

62 & 63 Vict. c. 51, s. 20, sub-s. 1—*Sale of Food and Drugs* - - - - **388**
See ADULTERATION. 2.

1900.

63 & 64 Vict. c. 51, s. 2, sub-s. 1 (*b*)—*Money-lenders* - - - - - - **235**
See MONEY-LENDER.

1902.

2 Edw. 7, c. 42, ss. 7, 8—*Education* - **161**
See SCHOOLS.

1903.

3 Edw. 7, c. 36, s. 2, sub-s. 4—*Motor Car* **511**
See MOTOR CAR.

1905.

5 Edw. 7, c. 11, ss. 1, 3—*Railway Fires* **406**
See RAILWAY. 1.

1906.

6 Edw. 7, c. 41, s. 60—*Marine Insurance* **5**
See INSURANCE (MARINE). 2.

6 Edw. 7, c. 58—*Workmen's Compensation* **317**
See EMPLOYER AND WORKMAN. 10.

—— —— s. 1, sub-s. 1 - - - **131, 155**
See EMPLOYER AND WORKMAN. 1, 15.

—— —— s. 1, sub-s. 3; Sched. I. (1.), (16.); Sched. II. (9.) - - - - **141**
See EMPLOYER AND WORKMAN. 3.

—— —— s. 2, sub-s. 1 - - - - **308**
See EMPLOYER AND WORKMAN. 13.

—— —— s. 3, sub-s. 1; s. 15, sub-ss. 2 and 3 - - - - - - **26**
See EMPLOYER AND WORKMAN. 8.

STATUTES—*continued.*

6 Edw. 7, c. 58, s. 5—*Workmen's Compensation* - - - - - - - **303**
See EMPLOYER AND WORKMAN. 7.

—— —— s. 6 - - - - - - **323**
See EMPLOYER AND WORKMAN. 12.

—— —— s. 7 - - - - - - **299**
See EMPLOYER AND WORKMAN. 14.

—— —— s. 8, sub-s. 1 (*c*) (iii.) - - **124**
See EMPLOYER AND WORKMAN. 11.

—— —— Sched. I. (9.) - - - - **118**
See EMPLOYER AND WORKMAN. 9.

—— —— Sched. I. (16.) - - - **292**
See EMPLOYER AND WORKMAN. 5.

—— —— Sched. II., cl. 10 - - - **150**
See EMPLOYER AND WORKMAN. 2.

1908.

8 Edw. 7, c. 68, s. 11, sub-s. 2 (*f*) (i.)—*Port of London* - - - - - - **585**
See LONDON. 4.

8 Edw. 7, c. 69, s. 26, sub-s. 3—*Companies (Consolidation)* - - - - - **354**
See COMPANY.

1910.

10 Edw. 7, c. 8, ss. 20, 66—*Finance* (1909-10) **281**
See REVENUE. 6.

10 Edw. 7 & 1 Geo. 5, c. 24, s. 29—*Licensing Consolidation* - - - - - **248**
See LICENSING ACTS. 3.

—— —— s. 32 - - - - - - **567**
See LICENSING ACTS. 2.

—— —— ss. 92, 93, 95 - - - - **425**
See LICENSING ACTS. 1.

STREETS—Waterworks—Breaking up streets—Laying water pipe therein — Subsequent subsidence of street — Cost of repair - - - - - - - - **16**
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STRIKE—Workmen's compensation - - **131**
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STRUCTURE—Dangerous structures—Power of London County Council to shore up - - - - - - - - **504**
See LONDON. 1.

SUCCESSION DUTY—Advowson—Proceeds of sale - - - - - - - - **192**
See REVENUE. 1.

SUMMARY JURISDICTION.
See under JURISDICTION.

SUMMONS—Originating.
See ORIGINATING SUMMONS.

SUPER-TAX—Mineral rights duty—Rental value - - - - - - - - **281**
See REVENUE. 6.

SURETY—Principal and.
See under PRINCIPAL AND SURETY.

TAXES—Inland Revenue.
See under REVENUE.

TENDER—Sale of goods—Tender of bill of lading from port of transhipment - - **94**
See SALE OF GOODS.

TRAMWAY—Rates—Assessment—"Land used only as a railway" - - - **216**
See RATES. 2.

TRIAL—New trial, Power of county court judge to order a—Hearing before magistrate—Mistake of law - - - - **528**
See COUNTY COURT. 2.

—— Unconditional leave to defend—Right of defendant to trial by jury - - **482**
See PRACTICE.

TRUSTEE IN BANKRUPTCY.
See under BANKRUPTCY.

UMPIRE—Arbitration—Appointment by Court—Originating summons—Arbitrator made respondent to summons - **542**
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VAGRANCY—Evidence—Admissibility—Living on earnings of prostitution—Evidence of wife - - - - - - **89**
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VENDOR AND PURCHASER—*Sale of Land—Contract in Writing—Signature of Purchaser's Name—Sufficiency of Description—Correspondence referring to Particulars of Sale—Particulars and Conditions of Sale forming one Document—Incorporation of Conditions—Repudiation of Liability—Memorandum of Contract—Measure of Damages for Breach of Contract—Statute of Frauds.*

It is not sufficient, in order to constitute a memorandum of a contract for the sale of land within the meaning of s. 4 of the Statute of Frauds, that the name of the purchaser should merely be placed upon the memorandum without any description. It must appear from the memorandum that the name was that of the purchaser of the land.

If the particulars of sale and the conditions of sale form one document and a letter signed by the purchaser refers to the particulars, the reference to the particulars will suffice to incorporate the conditions so as to constitute a sufficient memorandum within the section, and oral evidence may be given for the purpose of identifying the particulars referred to in the correspondence.

Where there is a repudiation in writing of a contract of sale of land by the party to be charged, upon the ground that the facts he sets out in the writing do not render him liable, the repudiation does not prevent the documents from containing a signed note of the verbal contract upon which he will be liable if there is, apart from the repudiation, a sufficient note within the Statute of Frauds.

A contract of sale of a farm by auction contained the following condition:—"If the purchaser shall neglect or fail to comply with any of the above conditions his deposit money shall be forfeited to the vendor who may with or without notice resell the premises without previously

VENDOR AND PURCHASER—*continued.*

tendering a conveyance to the defaulter at this sale and any resale may be made by auction or private contract at such time subject to such conditions and in such manner generally as the vendor may think proper and if thereby the vendor shall incur a loss by reason of diminution in price or expenses incurred or both after taking into account the deposit the defaulter at this sale shall pay to the vendor the amount of such loss as liquidated damages and on any such resale by auction the premises may be bought in and all expenses consequent on an unsuccessful attempt to resell shall be forthwith paid to the vendor by the defaulter at this sale."

The purchaser, without having paid any deposit, refused to carry out the contract of purchase. The farm was subsequently resold, and the actual damage suffered by the vendor by reason of the breach of contract was less than the sum the purchaser would have deposited if he had carried out the contract. In an action brought by the vendor against the purchaser for damages for breach of the contract :—

Held, that the condition applied although no deposit had in fact been made, and that the vendor was entitled to recover the amount which would have been deposited by the purchaser if he had performed his contract, and not merely the actual damage suffered by the vendor. DEWAR *v.* MINTOFT - - **Horridge J. 373**

—— Bankruptcy of settlor—Voluntary settlement—Sale by voluntary donee after act of bankruptcy—Purchaser for value without notice—Title of trustee - **257**
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WATER—*Waterworks—Breaking up Streets—Laying Water Pipe therein—Subsequent Subsidence of Street—Cost of Repair—"Compensation for any damage"—"Recovery of damages not specially provided for"—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *ss.* 28, 85.

By s. 28 of the Waterworks Clauses Act, 1847, the undertakers may open and break up the soil of the several streets within the limits of the special Act and lay down pipes within the same, "doing as little damage as can be in the execution of the powers hereby or by the special Act granted, and making compensation for any damage which may be done in the execution of such powers." By s. 85, "with respect to the recovery of damages not specially provided for" the Railways Clauses Consolidation Act, 1845, is incorporated with that and the special Act ; and by s. 140 of the Railways Clauses Consolidation Act, 1845, the amount of such damages shall, in case of dispute, be ascertained and determined by two justices.

WATER—*continued.*

Undertakers for the supply of water to a borough under a special Act which incorporated the Lands Clauses Consolidation Act, 1845, and the Waterworks Clauses Act, 1847, under their statutory powers opened and broke up the soil of a public road, which was within the district of and repairable by the county council, and laid a water pipe therein, and the road was then filled in and restored to its original condition. The whole of the work was carried out in a proper, efficient, and workmanlike manner under the superintendence of the surveyor to the county council. Eight months after the completion of the work a portion of the road and a bank supporting it slipped, and the county council repaired the damage at a cost of 87*l.* The damage was the result of laying the water pipe in the road. The county council preferred a complaint before two justices under s. 28 of the Waterworks Clauses Act, 1847, to recover the cost of repairing the damage :—

Held, that the claim was properly made under s. 28 of the Waterworks Clauses Act, 1847, as being a claim for compensation for damage done in the execution of the undertakers' powers ; that the compensation claimed was "damages" the recovery of which was not specially provided for within the meaning of s. 85 ; and that therefore under s. 140 of the Railways Clauses Consolidation Act, 1845, two justices had jurisdiction to ascertain and determine the amount of such damages. SWANSEA CORPORATION *v.* HARPUR - - **Div. Ct. 16**

WATERWORKS.
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—— Annual value — Profits — Rural district council—Supply of water to contributory places - - - - **265**
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—— **r. 58** - - - - - - - **118**
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WRECK—Policy on ship—Cost of repair—Value of wreck - - - - - **5**
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